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2691
No. 12902

United States
Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

VS.

MATSON NAVIGATION COMPANY, a Corporation;
W. R. ECKHART, TUG LOUIE III,
Her Boilers, Engines, Tackle, Apparel, Furniture,
etc., and WESTPORT TOWBOAT COMPANY, a Corporation,

Appellees.

Apostles on Appeal

Appeal from the United States District Court,
for the District of Oregon.

No. 12902

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UNITED STATES OF AMERICA,

Appellant,

vs.

MATSON NAVIGATION COMPANY, a Corporation;
W. R. ECKHART, TUG LOUIE III,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Portland, Oregon,
Proctors for W. R. Eckhart, Appellees.

In the United States District Court for the
District of Oregon

In Admiralty
Civil 5454

UNITED STATES OF AMERICA,
Libelant,

vs.

MATSON NAVIGATION COMPANY, a Corporation;
W. R. ECKHART; Tug LOUIE III,
Her Boilers, Engines, Tackle, Apparel, Furniture,
etc., and WESTPORT TOWBOAT COMPANY, a Corporation,
Respondents.

LIBEL

To: The Honorable Judges of the United States District Court for the District of Oregon sitting in admiralty:

The Libel of the United States of America, a sovereign nation, as owner and operator of the Dredge Multnomah, and as owner of Dike No. 67-1, against Matson Navigation Company, a corporation; W. R. Eckhart, as pilot; Tug Louie III, her boilers, engines, tackle, apparel, furniture, etc., and Westport Towboat Company, a corporation, in a cause of collision, statutory, civil and maritime, alleges as follows:

Article I.

Libelant is now and at all times herein mentioned was a sovereign nation and the sole and only owner

and operator of the Dredge Multnomah, her floating pipeline, donkey scow, pontoons and appurtenant equipment, being a non-propelled pipeline dredge of 762 gross tons and 193 feet in length, and at all times herein alleged was a floating plant used and being used in the construction of improvements of a navigable river of the United States, to wit: the Columbia River, and was anchored outside of and on the Washington side of the main channel of the Columbia River off Westport, Oregon.

Article II.

Libelant is now and was at all times herein mentioned the owner of that certain Dike No. 61-2 located on the Columbia River and maintained by the United States Army Engineers for the preservation and improvement of its navigable waters the Columbia River within the meaning and provisions of Section 408 of Title 33 United States Code, said Dike being at all of said times duly charted and marked as such.

Article III.

At all times herein mentioned the SS William Harris Hardy, Official No. 248 745, was a steam screw ocean freight vessel of 7,886 gross tons owned by the United States of America and under bareboat charter to respondent, Matson Navigation Company, a corporation, and under and by virtue of said bareboat charter the said Matson Navigation Company, a corporation, was the owner of the said SS William Harris Hardy pro hac vice.

Article IV.

That respondent Matson Navigation Company is now and was during all times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of California, with its principal office in the City of San Francisco, California, and doing and qualified to do business in the State of Oregon.

Article V.

That at all times herein mentioned respondent W. R. Eckhart was and now is a resident of the State and District of Oregon and was and now is a duly licensed master mariner and pilot for the Willamette and Columbia Rivers between Portland and Astoria, Oregon, and engaged in the calling of a Columbia River Pilot and was on the 21st day of December, 1946, and at the time and place of the collision hereinafter described, employed by respondent Matson Navigation Company, a corporation, in piloting the SS William Harris Hardy down the Columbia River.

Article VI.

At all times herein mentioned respondent Tug Louie III, official No. 249 503, was an oil screw towing vessel of 60 gross tons and 320 horsepower, owned and operated by respondent, Westport Towboat Company, a corporation, which vessel is now lying afloat in navigable waters of the Columbia River within the jurisdiction of this Honorable Court, or will be within the jurisdiction of this

Honorable Court during the pendency of process herein.

Article VII.

That respondent Westport Towboat Company is now and was during the times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Oregon with its principal place of business in the city of Westport, State of Oregon.

Article VIII.

On the 21st day of December, 1946, at or about the hour of 1830 (6:30 p.m., P.S.T.) and at all times prior thereto, the aforementioned Dredge Multnomah and her equipment was in a seaworthy condition, properly anchored, properly officered and manned, with proper anchorage lines and proper anchors set in the manner required by law for a dredge riding at anchor on the Washington side of the Columbia River, approximately 3200 feet downstream from Light Buoy G-2 Fl. W. in the vicinity of Westport Bar, about 166 feet upstream from Dike 67-1 and about 250 feet from the Center line of the deep water channel of the Columbia River; that said dredge complied with all of the requirements of the rules of the road for a dredge riding at anchor and complied with all the requirements that the customary Columbia River signals to be given to a vessel approaching her anchorage.

Article IX.

That shortly before the hour of 6:30 p.m., on

December 21, 1946, the Tug Louie III was proceeding downstream with a log raft in tow, the tow consisting of eleven sections of approximately 65 feet each, giving a total of 700 feet as the length of her tow, and was approaching the Dredge Multnomah; that after passing signals were exchanged between the Tug Louie III and the Dredge Multnomah the said Tug Louie III proceeded on a course to carry it across the channel and to the right hand side thereof, causing the log tow to foul the donkey scow's anchor cable appertaining to the Dredge Multnomah, causing the said donkey scow, with her cables, to be carried away and to drift with its pipeline across the Columbia River channel and further to cause the said Tug Louie III and its tow to collide with the Dredge Multnomah, resulting in damage to the Dredge Multnomah, her floating pipelines, donkey scow and appurtenant equipment as is hereinafter more specifically set forth.

Article X.

That shortly before the hour of 6:30 p.m., on December 21, 1946, the SS William Harris Hardy aforesaid, was proceeding down the Columbia River in the main channel thereof, with respondent W. R. Eckhart, a Columbia River Pilot at the conn and was approaching the point where the said Dredge Multnomah was anchored at the time aforesaid when the Tug Louie III, with its tow, had crashed into the Dredge Multnomah and was fouled with the pipeline and appurtenant equipment of the Dredge Multnomah; that notwithstanding a danger

signal having been given to the SS William Harris Hardy by the Tug Louie III, it nevertheless carelessly and negligently attempted to pass the same and in so doing collided with the end of said Dike 67-1 destroying approximately 100 feet of the outer end thereof, all to the damage of the United States of America as hereinafter more specifically set forth.

Article XI.

That the collision between the Tug Louie III and the Dredge Multnomah, its floating pipeline, donkey scow and appurtenant equipment and Dyke 67-1 was not caused or contributed to by any fault, negligence or want of care on the part of libelant, United States of America, or those in charge of the Dredge Multnomah or her officers or crew, but as libelant, United States of America, is informed and therefore alleges, was proximately caused or contributed thereto by the negligence and fault of the Tug Louie III and her owners, officers and operators and members of her crew; the respondent, Westport Towboat Company, a corporation, its officers, agents and employees, in the following respects, among others:

(1) That the Tug Louie III and her log tow were in an unseaworthy condition, and said tow was not properly made up for such towage;

(2) That the said Tug Louie III did not have sufficient power to properly or at all maintain control of her tow, and the towing lines and bridles were not properly placed and maintained for such towage;

(3) in attempting to pass the Dredge Multnomah in the deep main channel when her tow was drifting at an angle so as to involve her in a collision;

(4) in failure to pass in more shallow water, which could and should have been done under the circumstances then and there existing;

(5) that the Tug Louie III and respondent Westport Towboat Company violated the provisions of Section 408 et seq. of Title 33, United States Code;

(6) that the Tug Louie III was not in charge of competent persons;

(7) that the said Tug Louie III failed to maintain a proper, competent and good lookout;

(8) that the said Tug Louie III failed to alter her course to port sufficient to clear the Dredge Multnomah and its appurtenant equipment;

(9) that said Tug Louie III blocked the main deep water channel at said point, causing the said SS William Harris Hardy to turn hard to port, causing her to run upon and against Dike 67-1 and

(10) that the Tug Louie III and those in charge of her navigation were guilty of other faults which will be proven at the trial.

Article XII.

That the said collision with Dike 67-1 was not caused or contributed to by any fault, negligence or want of care on the part of libelant, United

States of America, or those in charge of the Dredge Multnomah, or her officers or crew, but as libellant, United States of America, is informed and therefore alleges, was proximately caused or contributed to by the joint negligence and fault of the said Tug Louie III, her owners, officers, operators and members of her crew, and the Westport Towboat Company, a corporation, as hereinbefore alleged, and was also proximately contributed to the carelessness, recklessness and negligence on the part of the SS William Harris Hardy and her owners, officers, operators and members of her crew, and the respondent Matson Navigation Company, a corporation, its officers, agents and employees, and the negligence and fault of respondent W. K. Eckhart, as pilot, and the officers and members of the crew of the said SS William Harris Hardy, in the following respects, among others:

(1) That the SS William Harris Hardy and respondent W. K. Eckhart violated the provisions of Section 408 et seq. of Title 33, United States Code;

(2) that the SS William Harris Hardy was not in charge of competent persons;

(3) that the pilot, master, officers and crew of said vessel were incompetent and were not properly stationed and attentive to their duties;

(4) that the said vessel failed to maintain a proper, competent, or good lookout;

(5) that the said vessel proceeded at an immoderate and excessive rate of speed under the prevailing visibility conditions;

(6) that the vessel prior to and at the time of the collision was negligently proceeding outside the limits of the main channel of the Columbia River;

(7) that the vessel violated the Inland Rules of the Road in proceeding at an immoderate and excessive rate of speed under the prevailing visibility conditions and failed to reduce the speed of the vessel or cause the engines stopped or reversed, as required by law;

(8) that the SS William Harris Hardy failed to navigate in accordance with the danger signal given by the Tug Louie III;

(9) that said vessel failed to slow, stop, or stop and reverse her engines when danger of collision was, or should have been, apparent;

(10) that said vessel failed to slow, stop, or stop and reverse her engines, when it became apparent that she could not maneuver to port around the Tug Louie III and its tow without running upon and against Dike 67-1; and

(11) that the SS William Harris Hardy, and those in charge of her navigation, were guilty of other faults which will be proven at the trial.

Article XIII.

In consequence of said collision, the Dredge Multnomah, its floating pipelines, donkey scow, and appurtenant equipment were injured and damaged in the amount of \$600.45, representing the reasonable cost of collision repairs and expense; and further

on consequence of said collision Dike 67-1 was injured and damaged in the amount of \$7,567.50, representing the reasonable cost of collision repairs and expenses.

For a second and separate cause of action, libellant, United States of America, alleges:

Article I.

Repeats and realleges, as though fully set forth herein, all of the allegations of Articles I, II, III, IV, V, VI and VII of the first cause of action hereinabove set forth.

Article II.

That prior to and on the 21st day of December, 1946, the Dredge Multnomah was lying at anchor on the Washington side of the Columbia River approximately 3200 feet downstream from Light Buoy G-2, Fl.W. in the vicinity of Westport Bar, about 1600 feet upstream from Dike 67-1, and about 250 feet from the center line of the deep water channel of the Columbia River, bow downstream, parallel with the main channel, but outside, on the right hand side, going down river, with its floating pipeline extending 300 feet directly up river astern of the dredge and paralleling the channel, and with a pipeline connected to a small steam donkey scow, which was anchored and had been and was engaged in the construction, on behalf of the United States of America, in the improvement work for the preservation and improvement of the Columbia River, a

navigable river, said dredge and its equipment constituting a floating plant used in the construction of such work within the meaning and provisions of Section 408 et seq., Title 33, United States Code.

Article III.

That immediately downstream and approximately 1600 feet from the Dredge Multnomah in the said Columbia River was Dike 67-1, built by libelant, United States of America, for the preservation and improvement of the Columbia River.

Article IV.

That on the 21st day of December, 1946, at about 1830 (6:30 p.m., P.S.T.) respondent vessel Tug Louie III, while proceeding down the main channel of the Columbia River collided with and caused serious damage to said Dredge Multnomah, her donkey scow, pipeline, and appurtenant equipment, the reasonable cost of repairs and expenses being the amount of \$600.45.

Article V.

That on the 21st day of December, 1946, immediately after 1830 (6:30 p.m., P.S.T.) respondent vessel SS William Harris Hardy, while proceeding down the main channel of the Columbia River with respondent W. R. Eckhart as pilot at the conn on board said vessel collided with and caused serious damage to Dike 67-1, the reasonable cost of repairs and expenses being in the amount of \$7,567.50.

Article VI.

All and singular the premises of the within libel and the first and second causes of action thereof are true and within the maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant United States of America prays that process in due form of law, according to the course and practice of, this Honorable Court, in causes of admiralty and maritime jurisdiction may issue against Matson Navigation Company, a corporation; W. R. Eckhart; Westport Towboat Company, a corporation, and the said Tug Louie III, her engines, tackle, boilers, etc., and that all persons claiming any interest in said Tug Louie III, her engines, tackle, boilers, etc., may be cited to appear and answer on oath all and singular the matters hereinabove set forth, and that this Honorable Court may be pleased to decree to libelant its damages as claimed, with interest and costs, and the further sum of not less than \$500.00, nor more than \$2,500.00 as provided by Section 411 of Title 33, United States Code, said sum to be placed to the credit of the appropriation for the improvement of the Columbia River, where such damage occurred, and that the said Tug Louie III be condemned and sold to satisfy the claim of libelant herein and to pay libelant said damages, if any as this Honorable Court may decree to the libelant, together with costs, and that the libelant may have

such other and further relief as in law and justice it may be entitled to receive.

/s/ HENRY L. HESS,
United States Attorney.

/s/ VICTOR E. HARR,
Assistant United States
Attorney.

/s/ KEITH R. FERGUSON,
Special Assistant to the Attorney General, Proctors
for Libelant.

State of Oregon,
County of Multnomah—ss.

I, Victor E. Harr, being first duly sworn, depose and say that I am an Assistant United States Attorney for the District of Oregon and one of the Attorneys for the Libelant, United States of America, in the within-entitled action and that the foregoing Libel is true as I verily believe.

/s/ VICTOR E. HARR.

Subscribed and sworn to before me this 19th day of May, 1950.

[Seal] /s/ FLORENCE McKAY,
Notary Public for Oregon.

My Commission expires 9-4-51.

[Endorsed]: Filed May 22, 1950.

[Title of District Court and Cause.]

CLAIM FOR TUG LOUIE III.

Comes Westport Towboat Company, an Oregon corporation, and claims to be the owner of the Tug Louie III, her boilers, engines, tackle, apparel, furniture, etc., and prays for leave to defend this suit on behalf of said Tug Louie III accordingly.

/s/ MacCORMAC SNOW,
Proctor for Claimant, Westport Towboat Company.

Service of copy acknowledged.

[Endorsed]: Filed June 12, 1950.

[Title of District Court and Cause.]

EXCEPTIONS

Comes Westport Towboat Company, an Oregon corporation, appearing as claimant of the Tug Louie III, her boilers, engines, tackle, apparel, furniture, etc., and also as respondent in personam, and excepts to the Libel and the whole thereof upon the following grounds:

1. Said Libel combines a claim against the Tug Louie III and its bondsmen and Westport Towboat Company, based on absolute statutory liability together with a claim for liability based on alleged fault.

2. The said Libel includes a claim against Westport Towboat Company in personam for absolute liability for dredge damage and dike damage, contrary to the Statute, and thereby seeks to take the property of the said Westport Towboat Company without due process of law.

3. The said Libel includes a claim against the Tug Louie III and its bondsmen for dredge damage contrary to the Statute and thereby seeks to take the property of the said bondsmen without due process of law.

4. The said Libel seeks to invoke the admiralty jurisdiction of the above Court for damage to a shore structure and in this connection this excepting party asserts that Section 740 of Title 46, U.S.C. is unconstitutional because it conflicts with Article III, Section 2 of the United States Constitution.

5. The prosecution of this suit is and should be barred by laches for the reason that approximately three and one-half years has intervened between the acts and occurrences alleged in the Libel and the time of filing of the said Libel.

/s/ MacCORMAC SNOW,
Proctor for Westport Towboat Company, Claimant
and Respondent.

Service of copy acknowledged.

[Endorsed]: Filed June 23, 1950.

[Title of District Court and Cause.]

EXCEPTIONS TO LIBEL

Comes now respondent, Matson Navigation Company, and excepts to the libel upon the following grounds:

1. Said libel combines claims against Matson Navigation Company, one based upon an absolute statutory liability, and the other upon negligence or fault.

2. The libel seeks to recover damages from Matson Navigation Company in a suit in personam based upon absolute statutory liability contrary to Title 33, Section 408, et seq. U.S.C.A.

3. The libel seeks to invoke the admiralty jurisdiction of the above-entitled court for damage to a shore structure occurring prior to the enactment of Title 46, Section 740, U.S.C.A.

4. The libel seeks to invoke the admiralty jurisdiction of the above-entitled court for damage to a shore structure under Title 46, Section 740, U.S.C.A., and said statute is unconstitutional because it is in conflict with Article 3, Section 2, of the United States Constitution.

5. The libel seeks a recovery from Matson Navigation Company, as well as others, for damage resulting from independent torts and not from tortious acts in which all of the respondents concurred or participated.

6. The damage which libelant seeks to recover resulted from accidents of navigation more than three years and five months prior to the filing of the libel and all of the facts and circumstances were immediately known and available to the libelant on the date of the accident. The claim is, therefore, barred by libelant's laches.

KRAUSE, EVANS & KORN,
/s/ GUNTHER F. KRAUSE,
Proctors for Respondent,
Matson Navigation Co.

Service of copy acknowledged.

[Endorsed]: Filed June 26, 1950.

[Title of District Court and Cause.]

EXCEPTIONS TO LIBEL

Comes now respondent W. R. Eckhart and excepts to the libel on the following grounds:

1. The libel combines claims against W. R. Eckhart, one based upon absolute statutory liability, and the other based on alleged fault or negligence.

2. The libel seeks to recover damages from W. R. Eckhart in a suit in personam based upon absolute statutory liability contrary to Title 33, Sec. 408, et seq., U.S.C.A.

3. The libel seeks to invoke the admiralty jurisdiction of the above-entitled court for damages to

a shore installation occurring prior to the enactment of Title 46, Section 740, U.S.C.A.

4. The libel seeks to recover from W. R. Eckhart, as well as others, for damage resulting from independent torts and not from tortious acts in which all the respondents concurred or participated.

/s/ ARTHUR S. VOSBURG,

/s/ WILLIAM H. HEDLUND,

/s/ FRANK M. K. BOSCH,

Proctors for Respondent,

W. R. Eckhart.

Service of copy acknowledged.

[Endorsed]: Filed July 7, 1950.

[Title of District Court and Cause.]

PRELIMINARY PRE-TRIAL ORDER

A pre-trial conference was held on Monday, the 31st day of July, 1950, before the undersigned Judge, attended by Victor E. Harr, United States attorney, on behalf of the libelant; Gunther F. Krause, on behalf of Matson Navigation Company; Arthur S. Vosburg, on behalf of the respondent W. R. Eckhart; and MacCormac Snow, on behalf of the Westport Towboat Company as respondent and as claimant of the Tug Louie III, whereupon the following pre-trial order was adopted.

The purpose of this pre-trial order is to separate from the other factual and legal issues of the case

the issues having to do with the jurisdiction of this court. This pre-trial order is therefore not a complete pre-trial order because it does not state or purport to state all of the legal and factual issues of the case, but is limited to determining the legal issues raised by exceptions filed by each of the respondents and in determining the jurisdiction of this court to proceed in admiralty. For the purpose of this pre-trial order the allegations of the Libel are taken as true. In subscribing and consenting to this pre-trial order, none of the respondents waives his or its rights to deny any or all of the allegations of the Libel or to raise and submit factual issues upon any of said allegations, and each of the respondents reserves his or its right in that respect.

It is stipulated by all of the parties that at the times named in the Libel before Dike 67-1 was struck, said dike extended from the Oregon shore outwardly toward the main ship channel a distance of about 800 feet.

Jurisdictional Issues as to First Cause of Action

The Libel, in the first cause of action, alleges that the Tug Louie III and its tow of logs by reason of the negligence of its operators fouled the anchor line and the pipe line of the dredge and crashed into the dredge itself; that the Tug blocked the main deep water channel causing the William Harris Hardy to run against the Dike 67-1; that the Hardy through the negligence of its operator,

crashed into and destroyed approximately 100 feet of the outer end of Dike 67-1; that the first accident and damage to the dredge and appurtenances was caused by the sole negligence of the Tug and the second accident was proximately caused by the negligence of those operating the Tug and the Hardy.

All the respondents and the claimant above named contend that this court has no admiralty jurisdiction of the alleged tort to Dike 67-1. The government denies said contention and charges that this court sitting in admiralty has jurisdiction of the alleged tort to Dike 67-1.

The above-named respondents and claimant contend that this court cannot entertain in a single suit in admiralty the claim of the government for damage to the dredge and her equipment and its claim for damage to Dike 67-1. The United States denies said contention and charges that it can sue in the same admiralty court and cause for both damages.

The said respondents and claimant contend that this court sitting in admiralty cannot take jurisdiction of the alleged tort upon and damage to Dike 67-1 under the Shore Damage Act of June 19, 1948, (46 U.S.C. 740), on the ground that the occurrences alleged in the Libel took place prior to the passage of this Act and that this Act has no retroactive application. The United States denies said contention and charges that this court sitting in admiralty can take jurisdiction of the tort upon and damage to Dike 67-1 under the said Shore Damage Act.

Westport Towboat Company, as claimant of the Tugboat Louie III, further charges with respect to said Shore Damage Act that this court cannot take jurisdiction in rem of the Tugboat Louie III under said Act because of a transaction which occurred after said Act was passed because the basis of jurisdiction in rem is a maritime lien and to impose upon the said Louie III a maritime lien by the retroactive application of said Act would constitute the taking of the property of the Tug Louie III, its stipulators and claimants without due process of law contrary to the Fifth Amendment to the United States Constitution. United States denies the said contention and charges that Louie III can be held liable in rem under the Shore Damage Act for a tort occurring prior to the passage of the Shore Damage Act.

All of the aforesaid respondents and claimant charge that the said Shore Damage Act is unconstitutional as an attempt upon the part of the Congress to extend the limits of admiralty jurisdiction beyond the boundaries described in Article III, Section 2, of the United States Constitution. United States denies the said contention and charges that said Shore Damage Act is in all respects constitutional.

Jurisdictional and Legal Contentions With Respect to Second Cause of Action Alleged in the Libel

The second cause of suit alleges that the Tug Louie III and her tow of logs ran into and damaged the dredge and its pipe line, anchor line and

equipment and that the Hardy ran into the Dike and seeks to hold all respondents for all damages and penalties under the Act of March 3, 1899, 33 U.S.C. 408 and 412.

All of the respondents and the claimant contend that this court sitting in admiralty is without jurisdiction to entertain the claim of the government for damage and penalties under the said statute on account of the alleged injuries to Dike 67-1 and that their liability, if any, is in a court of law. United States denies this contention and charges that this court sitting in admiralty has jurisdiction of the said torts and resulting damage.

The respondents Matson Navigation Company and Westport Towboat Company deny that they are subject to any statutory liability under the said Act.

Respondents Matson Navigation Company and Westport Towboat Company and W. R. Eckhart contend that they cannot be held liable for damages to Dike 67-1 under the Act of March 3, 1899, 33 U.S.C. 408 et seq., as no facts are alleged bringing them or either of them within the purview of the said Act. The United States denies this contention.

Respondent W. R. Eckhart contends that he cannot be held liable for a fine of not less than \$500.00 or more than \$2500.00 under the Act of March 3, 1899, 33 U.S.C. 408 et seq., as the United States does not contend that he wilfully injured or destroyed Dike 67-1. The United States denies this contention.

Jurisdictional Contentions With Respect to
Both Causes of Suit

The respondents above named, and the claimant, contend that this court is without jurisdiction to hear a suit partly in admiralty and partly upon the common law side of the court but that any two such causes of action must be separately stated and in separate complaints and separate suits. The government denies the said contention.

The said respondents and the claimant contend that this court is without jurisdiction to hear the first cause of action based upon fault and negligence together and at the same time with a cause of action based upon alleged statutory liability, but that said two causes of action should be separated in separate complaints and filed as separate suits. The government denies the said contention.

The parties hereto agree to the foregoing Preliminary Pre-Trial Order in order to determine the legal and jurisdictional questions raised by exceptions filed and for no other purpose.

Dated at Portland, Oregon, this 4th day of August, 1950.

/s/ GUS J. SOLOMON,
Judge.

Approved:

/s/ VICTOR E. HARR,
Of Attorneys for
United States.

/s/ GUNTHER F. KRAUSE,
Of Attorneys for Respondent,
Matson Navigation Co.

/s/ ARTHUR S. VOSBURG,
Of Attorneys for Respondent,
W. R. Eckhart.

/s/ MacCORMAC SNOW,
Attorneys for Tug Louie III and Westport Tow-
boat Company.

[Endorsed]: Filed August 4, 1950.

ORAL OPINION

October 13, 1950.

In the case of the United States of America, libelant, vs. Matson Navigation Company, et al., respondents, Civil No. 5454, by preliminary pre-trial order all of the parties consented to a trial limited solely to determining the jurisdiction of this Court to entertain libelant's claim for damages against claimant and respondents by reason of their alleged negligent injury and damage to dike No. 67-1 owned by libelant as set forth in libelant's first cause of action and for libelant's claim for damages and penalties against claimant and respondents for the injury and damage to dike 67-1 under the Act of March 3, 1899, (33 USC 408 and 412), as set forth in libelant's second cause of action.

In connection with libelant's first cause of action, I find that, prior to the enactment of the Shore Damage Act of June 19, 1948, (46 USC 740), the Court sitting in admiralty had no jurisdiction of the alleged tort to dike 67-1 and that the Shore Damage Act had no retroactive application to this accident which occurred on December 21, 1946.

In connection with libelant's second cause of action, I find that the Court sitting in admiralty has no jurisdiction to entertain claim of libelant for damages and penalties under the Act of March 3, 1899, for injuries to the dike alleged to have been damaged by claimant and respondents.

Mr. MacCormac Snow is hereby designated to prepare an appropriate order in conformity with this oral opinion.

[Endorsed]: Filed April 12, 1951.

In the United States District Court for the
District of Oregon

In Admiralty

No. 5454

UNITED STATES OF AMERICA,

Libelant,

vs.

MATSON NAVIGATION COMPANY, a Corporation;
W. R. ECKHART; TUG LOUIE III; Her Boilers, Engines, Tackle, Apparel,
Furniture, etc., and WESTPORT TOWBOAT
COMPANY, a Corporation,

Respondents.

ORDER

This cause coming on to be heard upon the Libel and the exceptions thereto filed by the respondents Matson Navigation Company and W. R. Eckhart and Westport Towboat Company, and filed also by the said Westport Towboat Company as claimant of the Tug Louie III, her boilers, engines, tackle, apparel, furniture, etc., and upon the preliminary pre-trial order, dated July 31 1950, approved by the libelant and the said respondents and the said claimant and signed by the Honorable James Alger Fee, Senior Judge of the above-entitled court, and the undersigned Judge the Honorable Gus J. Solomon having heard arguments on behalf of the libelant and the said respondents and the said claimant upon the said Libel, exceptions and pre-

liminary pre-trial order and upon the issues of law raised thereby and having then taken the cause under advisement and being now fully advised, now therefore, it is

Considered, Ordered and Decreed as follows:

1. In connection with libelant's first cause of action, this Court sitting in admiralty has no jurisdiction of the alleged negligent tort, resulting in injuries to dike 67-1 and the Shore Damage Act of June 19, 1948, (46 U.S.C. 740), had no retroactive application to this accident which occurred on December 21, 1946.

2. In connection with the second cause of action alleged in said libel, this Court sitting in admiralty has no jurisdiction to entertain the claim of the libelant for damages and penalties under the act of March 3, 1899, (33 U.S.C. 408 and 412), for injuries to the said dike 67-1.

3. The aforesaid exceptions to the libel are allowed.

4. The libel is dismissed as to the respondents Matson Navigation Company and W. R. Eckhart.

5. The libel is dismissed as to the respondent Westport Towboat Company and the Tug Louie III and said Westport Towboat Company its claimant insofar as it alleges claims growing out of the said act of March 3, 1899, for injuries to dike 67-1 and the dredge Columbia and its equipment.

6. The libelant is allowed twenty days' time

within which to file an amended libel confining its claim of damage to the dredge Multnomah and its equipment based on negligence.

Dated October 27, 1950.

/s/ GUS J. SOLOMON,
Judge.

[Endorsed]: Filed October 27, 1950.

[Title of District Court and Cause.]

MOTION

Comes now the libelant above named, by and through its attorneys, Henry L. Hess, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, and moves the Court for an order extending the time for filing the record on appeal and docketing the within action in the Circuit Court of Appeals to ninety days from the first date of filing of said Notice of Appeal. This motion is based on the grounds that the Department of Justice requires additional time to fully consider said appeal.

Dated at Portland, Oregon, this 20th day of February, 1951.

HENRY L. HESS,
United States Attorney for
the District of Oregon.

/s/ VICTOR E. HARR,
Assistant U. S. Attorney.

[Endorsed]: Filed February 20, 1951.

[Title of District Court and Cause.]

ORDER

This matter coming on to be heard ex parte this day upon motion of libelant, through its attorneys, Henry L. Hess, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, for an order extending time for the filing of the record on appeal and docketing the within action in the Circuit Court of Appeals, to enable the Department of Justice to have additional time to consider said appeal, and the Court being fully advised in the premises, it is

Ordered that the time for filing the within appeal and docketing the action be, and it is hereby extended to ninety days from the first date of the Notice of Appeal.

Made and entered at Portland, Oregon, this 20th day of February, 1951.

/s/ GUS J. SOLOMON,
District Judge.

[Endorsed]: Filed February 20, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Matson Navigation Company and its attorney
Gunther F. Krause; W. R. Eckhart and one of
his attorneys, Arthur S. Vosburg; Tug Louie
III and Westport Towboat Company and their
attorney, MacCormac Snow:

Notice is hereby given that the United States of
America, libelant above named, hereby appeals to
the United States Court of Appeals for the Ninth
Circuit, from the final order entered in this action
on the 27th day of October, 1950, in favor of re-
spondents and against libelant.

Dated this 17th day of January, 1951, at Port-
land, Oregon.

HENRY L. HESS,

United States Attorney for
the District of Oregon.

/s/ VICTOR E. HARR,

Assistant U. S. Attorney.

[Endorsed]: Filed January 18, 1951.

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS BY LIBELANT UNITED STATES OF AMERICA

Libelant, United States of America, hereby as-
signs error in the proceedings, orders, decisions and

Judgment of the District Court in the above-entitled action and Judgment and Decree entered October 27, 1950, as follows:

1. That the District Court erred in finding and entering its order and decree that the Court sitting in Admiralty had no jurisdiction of the tort alleged in the first cause of libel;

2. That the District Court erred in finding and entering its order that the Shore Damage Act of June 19, 1948, (46 USC 740) (Admiralty Jurisdiction Extension Act), has no retroactive application to the tort alleged in the libel;

3. That the District Court erred in finding and entering its decree that the District Court sitting in Admiralty had no jurisdiction to entertain libellant's claim for damages and penalties under the Act of March 3, 1899, (33 USC 408 and 412);

4. That the District Court erred in sustaining and allowing the exceptions to the libel;

5. That the District Court erred in dismissing respondent, Matson Navigation Company;

6. That the District Court erred in dismissing the respondent W. R. Eckhart;

7. That the District Court erred in dismissing the respondent Westport Towboat Company;

8. That the District Court erred in dismissing the respondent, the Tug Louie III and its claimant, Westport Towboat Company;

9. That the District Court erred in failing to retain jurisdiction in the above cause, and to cause issue to be joined on the allegations of the libel and to proceed to trial thereon.

HENRY L. HESS,
United States Attorney.

/s/ VICTOR E. HARR,
Assistant United States Attorney, Proctors for
Libelant, United States of America.

Service of copy acknowledged.

[Endorsed]: Filed April 11, 1951.

[Title of District Court and Cause.]

CITATION ON APPEAL

To: Matson Navigation Company, a corporation,
and Gunther F. Krause, its Proctor; W. R.
Eckhart and Arthur S. Vosburg, his proctor;
Tug Louie III, her boilers, etc., and Westport
Towboat Company, a corporation, and F. E.
Wagner, their proctor:

Whereas, the United States of America, libelant
above named, has lately appealed to the United
States Court of Appeals for the Ninth Circuit, from
the entry of an Order of the District Court entered
on October 27, 1950, in the United States District
Court for the District of Oregon;

You are, therefore, hereby cited to appear before
the said United States Court of Appeals for the

Ninth Circuit, to be held in the City of San Francisco, State of California, at the next term of said Court thirty days after the date of this citation, to do and receive what may appertain to justice to be done in the premises.

Given under my hand in the City of Portland, Multnomah County, State of Oregon, in the Ninth Circuit, on the 11th day of April, 1951.

/s/ GUS J. SOLOMON,
U. S. District Judge.

Service of Copy acknowledged.

[Endorsed]: Filed April 11, 1951.

[Title of District Court and Cause.]

LIBELANT'S DESIGNATION OF APOSTLES
ON APPEAL AND PRAECIPE THERE-
FOR

To: Gunther F. Krause, Spalding Building, Portland, Oregon, proctor for Matson Navigation Company; Arthur F. Vosburg, American Bank Bldg., Portland, Oregon, proctor for W. R. Eckhart; F. E. Wagner, Pacific Building, Portland, Oregon, proctor for Tug Louie III, etc., and Westport Towboat Company; and Lowell Mundorff, Clerk of the U. S. District Court for the District of Oregon.

Libelant hereby designates and requests that the

record on appeal in the above-entitled action shall include:

- (1) Libel.
- (2) Stipulation.
- (3) Claim of Westport Towboat Company for Tug Louie III.
- (4) Warrant of Arrest and Monition with Marshal's return.
- (5) Monition with Marshal's return.
- (6) Exceptions of respondent, Westport Towboat Company, a corporation, to the Libel.
- (7) Exceptions of respondent, Matson Navigation Company, a corporation, to the Libel.
- (8) Appearance of respondent, W. R. Eckhart and Motion for Extension of Time.
- (9) Exceptions to Libel of respondent, W. R. Eckhart.
- (10) Preliminary Pre-Trial Order.
- (11) Opinion of Judge Gus J. Solomon.
- (12) Order of the Court dated October 27, 1950.
- (13) Notice of Appeal.
- (14) Stipulation for change of proctors.
- (15) Application for change of proctors.
- (16) Order changing proctors.
- (17) Motion to Extend Time for filing the record on appeal and docketing the within action.
- (18) Order allowing Extension of Time.
- (19) Assignments of Errors of Libelant.
- (20) Citation on Appeal.
- (21) This Designation of Apostles on Appeal and Praeceptum therefor.

Dated this 11th day of April, 1951, at Portland,
Oregon.

HENRY L. HESS,
United States Attorney.

/s/ VICTOR E. HARR,
Assistant United States Attorney, Proctors for
Libelant, United States of America.

Service of Copy acknowledged.

[Endorsed]: Filed April 11, 1951.

[Title of District Court and Cause.]

DOCKET ENTRIES

1950

May 22—Filed libel in personam and rem.

May 22—Issued monition to marshal.

May 22—Issued warrant of arrest and monition to
marshal.

June 12—Filed claim for Tug Louie III.

June 16—Filed warrant of arrest and monition with
marshal's return.

June 21—Filed monition with marshal's return.

June 23—Filed exceptions to libel (Westport Tow-
boat Co.).

June 26—Filed exceptions to libel (Matson Naviga-
tion Co.).

June 26—Filed appearance of respondent W. R.
Eckhart and motion for extension of time.

July 3—Entered order resetting exceptions to libel
on July 10, 1950.

1950

- July 7—Filed respondent W. R. Eckhart's exceptions to libel.
- July 10—Entered order setting for preliminary pre-trial conference July 31, 1950.
- July 10—Filed motion of Westport Towboat Co. to require production of records.
- July 31—Record of pre-trial conference and order assigning to Judge Solomon.
- Aug. 4—Record of pre-trial conference.
- Aug. 4—Filed and entered pre-trial order.
- Aug. 4—Record of trial before court on questions of law argued, submitted and U. A.
- Oct. 13—Record of oral opinion and entered order that deft. prepare and submit Findings of Fact and Conclusions of Law and Judgment.
- Oct. 27—Filed and entered order dismissing libel as to Matson Navigation Co. and W. R. Eckhart, dismissing libel in part as to Westport Towboat Co. and Tug "Louie III" and allowing libelant twenty days to file amended libel.

1951

- Jan. 18—Filed notice of appeal by U. S. and copies mailed to attys. Krause-Vosburg-Snow.
- Feb. 2—Filed application for change of proctors.
- Feb. 2—Filed stipulation for change of proctors.
- Feb. 2—Filed and entered order changing proctors.
- Feb. 20—Filed and entered order extending time for filing and docketing appeal.
- Feb. 20—Filed motion for above order.

1951

Apr. 11—Filed assignments of error by libelant,
United States of America.

Apr. 11—Filed libelant's designation of apostles on
appeal and praecipe therefor.

Apr. 11—Filed citation on appeal.

Apr. 12—Filed transcript of Court's oral opinion.

Apr. 12—Filed stipulation to abide and pay decree.

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of libel, warrant of arrest, monition, claim of Westport Towboat Company, stipulation to abide and pay decree, exceptions of Westport Towboat Company, exceptions of Matson Navigation Company, appearance of W. R. Eckhart, exceptions of W. R. Eckhart, preliminary pre-trial order, transcript of oral opinion, order of October 27, 1950, stipulation for change of proctors, application for change of proctors, order changing proctors, motion for order extending time to file transcript, order extending time to file transcript, notice of appeal, assignment of errors, citation on appeal, designation of apostles on appeal, and transcript of docket entries constitute the record on appeal from a judgement of said court in a cause therein numbered Civil 5454, in

which the United States of America is libelant and appellant, and the Matson Navigation Company, a corporation; W. R. Eckhart, Tug Louie III, and the Westport Towboat Company, are respondents and appellees; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 12th day of April, 1951.

[Seal] LOWELL MUNDORFF,
Clerk.

By /s/ F. L. BUCK,
Chief Deputy.

[Endorsed]: No. 12902. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Matson Navigation Company, a corporation; W. R. Eckhart, Tug Louie III, her boilers, engines, tackle, apparel, furniture, etc., and Westport Towboat Company, a corporation, Appellees. Apostles on Appeal. Appeal from the United States District Court for the District of Oregon.

Filed April 14, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Circuit Court of Appeals
For the Ninth Circuit

No. 12902

UNITED STATES OF AMERICA,

Appellant,

vs.

MATSON NAVIGATION COMPANY, a Corporation;
W. R. ECKHART, Tug LOUIE III, Her
Boilers, Engines, Tackle, Apparel, Furniture,
etc., and WESTPORT TOWBOAT COM-
PANY,

Appellees.

PETITIONER'S STATEMENT OF POINTS TO
BE RELIED ON ON APPEAL AND DES-
IGNATION OF PORTION OF RECORD TO
BE PRINTED

Petitioner adopts as points on appeal the Assignments of Error included in the Apostles on Appeal on file herein.

Petitioner designates for printing the entire Apostles on Appeal on file herein except the following:

Warrant of Arrest (Tug Louie III).

Monition.

Stipulation to abide and pay Decree.

Appearance of W. R. Eckhart.

Stipulation for Change of Proctors.

Application of Proctors.

Order changing Proctors.

/s/ HENRY L. HESS, K.M.T.
United States Attorney,

/s/ VICTOR E. HARR, K.M.T.
Assistant United States
Attorney,

/s/ KEITH R. FERGUSON,

/s/ LEAVENWORTH COLBY,
K.M.T.

Special Assistants to
the Attorney General.

[Endorsed]: Filed April 20, 1951.

**In the United States Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, LIBELANT-APPELLANT

v.

MATSON NAVIGATION COMPANY, A CORPORATION; W. R.
ECKHART, TUG LOUIE III, HER BOILERS, ENGINES,
TACKLE, APPAREL, FURNITURE, ETC., AND WESTPORT
TOWBOAT COMPANY, A CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES

HOLMES BALDRIDGE,

Assistant Attorney General.

HENRY L. HESS,

United States Attorney.

LEAVENWORTH COLBY,

KEITH R. FERGUSON,

Special Assistants to the Attorney General.

Attorneys for the United States.

FILED

JAN 17 1952

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 12902

UNITED STATES OF AMERICA, APPELLANT

v.

MATSON NAVIGATION COMPANY, A CORPORATION; W. R.
ECKHART, TUG LOUIE III, HER BOILERS, ENGINES,
TACKLE, APPAREL, FURNITURE, ETC., AND WESTPORT
TOWBOAT COMPANY, A CORPORATION, APPELLEES

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON*

BRIEF FOR THE UNITED STATES

JURISDICTION

This Court's jurisdiction rests upon 28 U.S.C. 1291 by reason of a notice of appeal, filed January 18, 1951 (R. 32) from an order entered October 27, 1950 (R. 28-30), which dismissed the Government's libel in all respects.

The jurisdiction of the district court rests upon 28 U.S.C. 1333 by reason of a libel in admiralty in two counts (the *first* for damages under the general maritime law, the *second* for penalties under the Rivers and

Harbors Act), filed May 22, 1950 (R. 3-15) to recover damages to various aids to navigation and equipment caused on December 21, 1946 by certain vessels operated and controlled by respondents.

QUESTIONS

A Government aid to navigation in the form of a dike attached to the shore of the Columbia River was damaged on December 21, 1946, prior to the enactment of the Admiralty Extension Act of June 19, 1948 (46 U.S.C. 740), as a result of the navigation of certain vessels operated and controlled by respondents. After the enactment of the Admiralty Extension Act, the United States on May 22, 1950 brought a libel in Admiralty to recover *inter alia* for the damage to the dike. The libel was in two counts, the first for damages under the general maritime law, the second for penalties under the Rivers and Harbors Act of March 3, 1899. The Court below dismissed the libel for want of Admiralty jurisdiction. The questions are—

1. Whether the Admiralty Extension Act, 1948, directs the district courts to exercise admiralty jurisdiction over claims arising out of damage by vessels to shore structures occurring prior to its enactment.

2. Whether claims arising out of damage by a vessel to an aid to navigation attached to the shore are within the constitutional grant of admiralty jurisdiction to the district courts.

STATUTE

The Admiralty Extension Act of June 19, 1948 (62 Stat. 496; 46 U.S.C. 740) provides:

Be it enacted by the Senate and House of Representatives of the United States of America in

Congress assembled, That the admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought *in rem* or *in personam* according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: * * *.

STATEMENT

All of the parties consented to a trial by the district court limited solely to determining the jurisdiction of the district court, sitting in admiralty, to entertain the Government's claim for injury to Dike No. 67-1 in the Columbia River by certain vessels operated and controlled by respondents: *First*, as set forth in its first cause of action, for damages by reason of the alleged negligent navigation of the vessels; and, *second*, as set forth in its second cause of action, for penalties under the Rivers and Harbors Act, 1899, by reason of the alleged status of the dike as an aid to navigation within that Act (R. 26).

With respect to the first cause of action for negligent navigation, the trial judge held that, aside from the Admiralty Extension Act of June 19, 1948, the court sitting in admiralty had no jurisdiction of damage to a shore structure and that the Extension Act had no application to a suit brought after its enactment to recover for an accident which occurred prior to its enactment. With respect the second cause of action, for penalties for violation of the Rivers and Harbors Act, 1899, the trial judge equally held that the court sitting in admir-

alty had no jurisdiction (R. 27). An appropriate order of dismissal was entered (R. 28-30) and this appeal followed.

ARGUMENT

Introduction

Admiralty courts, while not courts of equity, proceed upon equitable principles and like equity courts are courts of exceptional, not of general, jurisdiction, exercising a sound discretion in respect of exercising their special jurisdiction. There is thus a clear distinction between the term "jurisdiction" in its strict meaning as relating, on the one hand, to the existence of power in the court to hear and determine, and its use as relating, on the other, to those cases or occasions when this power to hear and determine will in fact be exercised by the court in its wise discretion. The fact that the United States Courts sitting in admiralty have ordinarily regarded cases of damages caused by a vessel to the shore as not a necessary and proper occasion for the routine exercise of admiralty jurisdiction does not conclusively establish the absence of judicial power to hear and determine such cases much less the absence of the constitutional power of Congress to direct the courts to exercise that admiralty power to its fullest extent. Thus it is familiar that when the court once takes admiralty jurisdiction it has power to deal with all connected matters although they arose on shore.

That Congress intended in the Admiralty Extension Act, 1948, to direct the courts that thereafter they should no longer withhold the exercise of their powers to hear and determine in admiralty which it regarded

them as already possessing under the Constitution and the Judiciary Acts, is plain from the very language of the reports of the Judiciary Committees of the House and Senate. Both Committees stated (1948 A.M.C. at 1505):

Adoption of the bill will not create new causes of action. It merely directs the courts to exercise the admiralty and maritime jurisdiction of the United States already conferred by Article III, Section 2, of the Constitution and already authorized by the Judiciary Acts.

It follows that, like every command of Congress to the courts regarding matters of procedure and not of substantive right, it applies to every suit pending or filed after its enactment, regardless of the date of the occurrence which gave rise to it.

Nor is the Congressional command that henceforth the courts shall exercise their pre-existing admiralty powers in cases of damage by ship to shore a novelty. In the words of House and Senate Committees (1948 A.M.C. 1504):

The bill will bring United States practice respecting maritime torts into accord with that followed by the British, who by a series of statutes, beginning in 1840, have restored admiralty jurisdiction in situations of this character and brought the British law into harmony with that of most European countries.

Indeed, as a matter of simple fact and history, nothing could appear more obvious than that damages wrongfully caused by a vessel to an aid to navigation, par-

ticularly as here structures situated on the shore, constitute in actual fact a maritime tort particularly appropriate for the exercise of the powers to hear and determine of an American no less than any other court of admiralty.

Had it not been for the conflicts between Lord Coke and the English admiralty judges and his issuance of prohibitions against their exercise of jurisdiction whenever maritime damage was within the body of a county so that a jury of the vicinage could be found, it may be doubted that any admiralty judge in either England or America would ever have been found to withhold the exercise of jurisdiction in a case so clearly maritime in fact. Certainly no other type of damage by shipping calls more strongly for the traditional admiralty relief, beginning with arrest of the ship *in rem*, than where a foreign vessel damages our shores and may otherwise sail away, leaving the injured claimant obliged to follow home its owner to a foreign land unless the admiralty will aid him. And so we find that both in England and in France, admiralty jurisdiction has long extended to damage done by a vessel to the shore. In France this has ever been the rule. In England it was the law before Lord Coke and a hundred years ago was restored again by statute.

In the United States the strictures of Lord Coke against admiralty jurisdiction of wrongs within the body of a county were early repudiated where damage between two vessels or between a vessel and those who served here, or were hurt aboard her, was concerned. So also where shore structures damaged a vessel; only

in respect of damage by a vessel to the shore has Lord Coke's hand still weighed upon us. But the Constitution did not import the dictates of Coke into our land. It gave the admiralty courts jurisdiction of every case reasonably regarded as maritime anywhere in the world without making one exception. "The judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction" (Art. III, Sec. 2). And, implementing the constitutional grant, the Judiciary Act of 1789, with equal broadness, conferred "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction" (1 Stat. 76). Today the Judicial Code still gives jurisdiction of "Any civil case of admiralty or maritime jurisdiction" (28 U.S.C. 1333). The Admiralty Extension Act, 1948, has merely commanded the courts henceforth to exercise the broad general power thus conferred.

We submit that the congressional command is effective and valid according to its terms and that the court below erred in disobeying by refusing to exercise admiralty jurisdiction in the case now at bar.

I

The Admiralty Extension Act, 1948, Validly Directs the Courts to Exercise the Full Admiralty Jurisdiction Already Granted Them by the Judiciary Act of 1789 in Every Suit Already Pending or Filed After Its Enactment on June 19, 1948

The legislative history of the Admiralty Extension Act of June 19, 1948 (62 Stat. 496; 46 U.S.C. 740) makes it plain that it was intended by the Congress to be purely procedural in character and was therefore regarded as applicable to every suit pending or filed

after its enactment, even though the cause of action had arisen prior to its enactment and would not previously have been entertained under the prior self-denying decisions of the admiralty courts.

In commenting on the bill before its enactment by Congress, the Department of Justice in a letter to the Chairman of the House Judiciary Committee drew attention to this retroactive effect of the bill. It observed (1948 A.M.C. 1512):

The bill would not create new causes of action but merely direct the courts to exercise the admiralty and maritime jurisdiction of the United States already conferred by Article III, Section 2, of the Constitution, and by the Judicial Code.

The probability of disputes, such as that in the case at bar, concerning this retroactive application of the proposed statute to causes where the damage antedated the act was expressly foreseen. Thus the Department of Justice recommended that the Act should not be made applicable to suits already brought but only to those subsequently filed. The Department's recommendation stated (1948 A.M.C. 1512)—

In order to avoid conflict or uncertainty, it is suggested that the bill be amended to indicate that it is to apply only to suits instituted after its adoption.

But in favorably reporting the bill, the House and Senate Judiciary Committees rejected this suggestion of the Department of Justice since, as the committees pointed out, the causes of action involved were already in existence and within the courts' power and the sole

effect of the bill was a procedural change. Both Committee reports stated (1948 A.M.C. 1505):

It merely specifically directs the courts to exercise the admiralty and maritime jurisdiction of the United States already conferred by Article III, Section 2, of the Constitution and already authorized by the Judiciary Acts.

Thus there can be no doubt of the Congressional purpose that admiralty procedure should apply not only to suits like the present, where the cause of action preceded the enactment of the Admiralty Extension Act, 1948, although the suit was filed afterwards, but also to suits already filed in admiralty prior to the enactment of the Admiralty Extension Act.

Nor can there be any question about the power of Congress to direct the courts henceforth to extend admiralty procedure to causes of action which pre-existed the enactment of the statute and to suits in admiralty already instituted prior thereto. Congress was fully informed of the decisions of the Supreme Court in *Jackson v. Steamboat Magnolia*, (1857) 20 How. 296, and *Propeller Genesee Chief v. Fitzhugh*, (1851) 12 How. 443, where it had been held that Congress might pass "a declaratory act reversing the decision" of the courts in prior cases as to the extent to which they would exercise their admiralty jurisdiction, but could not enlarge the jurisdiction itself as opposed to commanding the courts to extend its exercise. As pointed out in those cases, nothing in the Constitution or the Judiciary Act confines admiralty jurisdiction in any way. Both grant the courts power over "all cases of

admiralty and maritime jurisdiction"—a grant so broad that no new statutory words could possibly enlarge it.

That such mere procedural changes as are here involved always operate retroactively is elementary. As the Supreme Court recently observed of a similar procedural change in *Ex Parte Collett*, (1949) 337 U.S. 55, 71, the Extension Act "is a remedial provision applicable to pending actions, and 'No one has a vested right in any given mode of procedure * * *'", citing *Crane v. Hahlo*, (1922) 258 U.S. 142, 147. So here it is not open to appellees to urge that they damaged the Government's dike in reliance upon their expectation that the courts would not exercise their admiralty jurisdiction over the offense. Cf. *Chase Securities Co. v. Donaldson*, (1945) 325 U.S. 304, 316. It does not render this rule as to procedural change inapplicable that one of its incidental consequences is, as in the case now at bar, to alter the priority and order of payment of claims. *Carpenter v. Wabash Railway Co.*, (1940) 309 U.S. 23, 27. In legal effect all the Extension Act has done is to direct the courts to afford added procedural remedies. As the court said in *Berkovitz v. Arbib and Houlberg*, (1921) 230 N. Y. 261, 130 N.E. 288, 290, "All the statute has done is to make two remedies available where formerly there was none."

Neither would it matter if the procedural change had been, contrary to our view, one affecting the actual jurisdiction itself and not merely the courts' discretion as to its exercise. It is so elementary that there are few cases on the point, but there can be no dispute that,

absent a clear expression of contrary intent, a statute conferring a new jurisdiction will operate to give jurisdiction over causes of action arising before the passage of the Act. *Larkin v. Saffrans*, (W.D. Tenn., 1883) 15 Fed. 147; *United Wall Paper Factories, Inc. v. Hodges*, (2d Cir., 1934) 79 F. 2d 243, 244; *Cobleigh v. Epping Brick Co.*, (D. N.H., 1949) 85 F. Supp. 862, 863.¹

We submit, therefore, that unless the Admiralty Extension Act, 1948, is to be held unconstitutional in all respects, it applies not only to the present case but to every case either already pending or subsequently instituted.

II

The Rivers and Harbors Act, 1899, Created a Cause of Action Against the Vessel Itself Which Has Been Enforced and Enforceable in Admiralty under the Judiciary Act of 1789 for Many Years Prior to the Institution of the Present Suit

The majority rule in the federal courts has been established for many years that proceedings under the various Rivers and Harbors acts, like all other procedures for penalties and forfeitures against vessels for violation of the navigation laws, may be brought

¹ The serious question has always been not as to the *extension* but as to the *withdrawal* of pre-existing jurisdiction, but here again it is settled that, even though the case be on appeal when the statute is enacted, the statute, if it lacks special provision to the contrary, must be applied retroactively. *United States v. Kelly*, (9th Cir., 1899) 97 Fed. 460; *United States v. McCrory*, (5th Cir. 1899) 91 Fed. 295; *Fairchild v. United States*, (D. N.J., 1899) 91 Fed. 298. Thus in *Insurance Co. v. Richie*, (1866) 5 Wall. 541, 544, the court said: "It is clear, that where the jurisdiction of a cause depends upon a statute, the repeal of the statute takes away the jurisdiction. And it is equally clear, that where a jurisdiction, conferred by statute, is prohibited by a subsequent statute, the prohibition is, so far, a repeal of the statute conferring the jurisdiction." The converse, respecting extension of jurisdiction, follows *a fortiori*.

either in admiralty or at law at the choice of the Government. The Judiciary Act from the beginning provided for jurisdiction of all admiralty cases "including all seizures under laws of impost, navigation or trade of the United States where the seizures are made on waters which are navigable from the sea". This was early construed by Chief Justice Marshall in *The Betsey and Charlotte*, (1808) 4 Cranch. 443, to extend jurisdiction in respect of acts done on shore. In that case it was objected that the offense was committed on land, and thus without the admiralty jurisdiction, but the Chief Justice declared (p. 452): "It is the place of seizure, and not the place of committing the offense which decides the jurisdiction."

The admiralty jurisdiction for imposing such penalties for violation of the various harbor acts upon the vessel itself was, moreover, expressly upheld by the Supreme Court in *The Scow 6-S*, (1919) 250 U.S. 269, 272-273, where the Court said: "It treats the offending vessel as a guilty thing, upon the familiar principle of the maritime law, and permits a proceeding against her in any court of admiralty 'having jurisdiction thereof'—meaning any court within whose jurisdiction she may be found", and the Court concluded that admiralty jurisdiction was undoubted since, "if it be not a proceeding for enforcement of a penalty or forfeiture incurred under a law of the United States within the meaning of the 9th subdivision of § 24, Judicial Code, the Act of 1888 itself confers jurisdiction." The authorities are carefully reviewed and the existence of jurisdiction of cases under the 1899 Rivers and Harbors Act in admiralty as well as at law is upheld in *The*

Barbara Cates, (1936) 17 F. Supp. 241. A similar result had been earlier reached in *The Gansfjord*, (E.D. La., 1927) 17 F. 2d 613, 614, where, after alluding to *The Panoil*, (1925) 255 U.S. 433, 435, the court observed that but for the Rivers and Harbors Act jurisdiction would have been at law rather than in admiralty but that the navigation statute had brought the matter within the Judiciary Act.

The fact that in *The Gandsfjord* and other cases prior to the Admiralty Extension Act, 1948, it was the Government's usual practice in Rivers and Harbors Act cases to file two libels, one at law and the other in admiralty, in no wise detracts from the resultant double jurisdiction. As pointed out in *The Barbara Cates*, *supra* (at p. 244), the practical importance to the Government of whether the libel at law or the libel in admiralty, or both, are proceeded with is negligible. The usual practice of claimants has been to except to the libel at law on the ground that admiralty jurisdiction was exclusive and to the libel in admiralty on the ground that the exclusive jurisdiction was at law. The Government, as a matter of convenience, was thereby forced habitually to bring two libels. This is well illustrated in *The Gansfjord* litigation where both the admiralty and civil cases are reported and jurisdiction of the libel in admiralty is upheld in 17 F. 2d 613 and jurisdiction of the companion libel at law similarly upheld in 25 F. 2d 736.²

² Thus in both *The Gansfjord*, (5th Cir. 1929) 32 F. 2d 236, and *The Republic No. 2*, (S.D. Tex. 1946) 64 F. Supp. 373, the matter proceeded at law in accordance with the Government's usual policy, prior to the Extension Act, of treating the matter as immaterial. Moreover, the Government was successful on the merits and there could be no appeal. Cf. *The Dixie*, (S.D. Tex. 1941) 39 F. Supp.

In short, admiralty, as already pointed out in our introduction, is an exceptional jurisdiction the exercise of which is discretionary with the courts and the Government has always been of opinion that, while undoubted jurisdiction exists in admiralty, the courts were not, prior to the Admiralty Extension Act, abusing their discretion by refusing to exercise it where shore damage was involved. Thus Judge Knox summarized the matter as it stood before the 1948 Act when he said in *United States v. The Mount Parnes*, (S.D. N.Y) 1942 A.M.C. 223, 224 (not otherwise reported): "I believe that this court should not *exercise* its admiralty jurisdiction." (Emphasis supplied.) We submit, however, that Congress in the Admiralty Extension Act, 1948, has now for the first time commanded the courts to *exercise* in every case the full admiralty jurisdiction previously conferred by the Judiciary Acts and, unless the Admiralty Extension Act is to be held unconstitutional, it was the duty of the court below to comply in this case.

III

The Constitutional Grant of Admiralty Jurisdiction Extends to All Cases Maritime in Fact, Including Damages Caused by Vessels to Shore Structures

We believe that the constitutionality of the Admiralty Extension Act is unquestionable. In *De Lovio v. Boit*, (C. C. Mass., 1915) 7 Fed. Cas. No. 3,776, at p. 442, Justice Story pointed out that there are four possible historical interpretations of the constitutional grant of

395, previous proceedings, 30 F. Supp. 215, where no appeal was taken either at law or in admiralty from the attempt of the United States Attorney to bring libels for damage to a bridge as an "aid to navigation" under the Rivers and Harbors Act.

admiralty jurisdiction: (1) the restricted admiralty jurisdiction admitted in England at the time of the American Revolution; (2) the jurisdiction at the time of the emigration of the American colonists; (3) the admiralty jurisdiction exercised in the United States at the time of the American Revolution; (4) the ancient and original jurisdiction inherent in the admiralty of England corresponding to that of the continental admiralty courts. The latter, Story held to be the true interpretation. He thus refused to limit the constitutional grant of admiralty jurisdiction to the restraining statutes and judicial prohibitions of England.³ He pointed out that the framers of the Constitution were fully aware of the English disputes and discussions respecting the extent of admiralty jurisdiction.⁴ They

³ See the provisions of 13 Rich. II, c. 5 (1389), "The admirals and their deputies shall not meddle from henceforth of anything done within the realm, but only of a thing done upon the sea . . ." 15 Rich. II, c. 3 (1391), "Of all manner of contracts, pleas and quarrels, and all other things rising within the bodies of the countries . . . the admiral's courts shall have no . . . jurisdiction . . . but such shall be tried . . . by the laws of the land . . . except for death or maihem done in great ships in the main stream of great rivers beneath the bridges (points) of the same." And see 2 Hen. IV, c. 11 (1400), where a remedy was given him who was wrongfully pursued in the court of admiralty, with double damages allowed. Furthermore, through strained judicial constructions, admiralty was not allowed jurisdiction if the common law afforded a remedy, and consequently, English admiralty jurisdiction was stopped at the high-water mark. See Justice Story's elaborate discussion in *DeLovio v. Boit*, *supra*, esp. beginning pp. 421ff., 429ff.; *Waring v. Clarke*, 5 How. 441; Mears, *The History of the Admiralty Jurisdiction*, in 2 *Select Essays in Anglo-American Legal History*, p. 312, especially pp. 353, *et seq.*; Roscoe's *Admiralty Practice* (5th ed.), pp. 4-15; Marsden, Introduction, 2 *Select Pleas in the Court of Admiralty* (11 Selden Soc. Publ.); Marsden, *Law and Custom of the Sea*, Vol. 2, pp. vii-xxii. Compare Hoon, *The Organization of the English Customs System 1696-1786*, p. 276.

⁴ Warren, *History of the American Bar*, (1913) 279, 4 Beveridge, *Life of John Marshall*, (1919) 119.

therefore had added to the word "admiralty," which of itself included the broader jurisdiction of the colonial vice-admiralty courts, the still larger term "maritime," which referred to all causes that were both civil and maritime, as a matter of fact, "The language of the Constitution would therefore," he concluded, "warrant a most liberal interpretation." He declared (p. 443):

. . . it may not be unfit to hold that it had reference to that maritime jurisdiction, which commercial convenience, public policy, and national rights, have contributed to establish, with slight local differences, over all Europe; that jurisdiction, which, under the name of consular courts, first established itself upon the shores of the Mediterranean, and, from the general equity and simplicity of its proceedings, soon commended itself to all the maritime states; that jurisdiction, in short, which, collecting the wisdom of the civil law, and combining it with the customs and usages of the sea, produced the venerable Consolato del Mare, and still continues in its decisions to regulate the commerce, the intercourse, and the warfare of mankind.

And in *New England Marine Ins. Co. v. Dunham*, (1871) 11 Wall. 1, 24, the Supreme Court similarly declared:

This court has frequently declared and decided that the admiralty and maritime jurisdiction of the United States is not limited either by the restraining statutes or the judicial prohibitions of England but is to be interpreted by a more enlarged view of its essential nature and objects and with reference to analogous jurisdiction in other countries, con-

stituting the maritime commercial world, as well as to that of England.”

On the continent the historic jurisdiction extended to damage done by ships to shore structures. The French *Ordinance on the Marine of August 1681*, Liv. I, Title II, Arts. VI and VII,⁵ for example expressly extends the jurisdiction to shore side matters. But even in England this had been the original extent of jurisdiction. In *The Blackheath*, (1904) 195 U.S. 361, 365, Mr. Justice Holmes reviewed the ancient jurisdiction of the admiralty in England and pointed out that “The admiral’s authority was not excluded by attachment even to the main shore.” In the same way Story, a century before Holmes, had pointed out in *De Lovio v. Boit*, (7 Fed. Cas. at 421, 431):

And even Lord Coke admits, that maritime causes include causes arising upon the *sea shore* and in ports; for he declares “*maritima est super littus or in portu maris.*” Harkeridge’s case, 12 Coke, 129.

* * * * *

These pretensions, too, have been deliberately adopted by Sir H. Spelman, for he says (Spel. Reliq. Adm. Jur. 226) “The place absolutely subject to the jurisdiction of the admiralty is the sea,

⁵ The French admiralty courts: “VI. Shall equally have jurisdiction of damages caused by seagoing vessels to fish traps constructed even in navigable rivers and those which the vessels receive from them; as well as to the roads employed for towing vessels coming from the sea, if there is no local right, title or interest to the contrary.” The Admiralty courts furthermore: “VII. Shall also have jurisdiction of damages done to quais, dikes, jetties, palisades and other works erected against the violence of the sea, and shall see to it that ports and roadsteads are maintained clear and of proper depth.”

which seemeth to comprehend public rivers, fresh waters, creeks, and surrounded places whatsoever, within the ebbing and flowing of the sea at the highest water, the *shore or banks* adjoining, from all the first bridges seaward." (Emphasis supplied)

Thus Story quoted from one of the commissions granted by the Crown to the Admiral observing (*ibid.*, 436):

It authorizes the admiralty "to hold conusance of . . . any cause, business or *injury* whatsoever had or *done* in or upon or through the seas, or public rivers or fresh waters, streams, havens, and places subject to overflowing whatsoever within the flowing and ebbing of the sea, *upon the shores or banks whatsoever adjoining to them or either of them* from any of the said first bridges whatsoever towards the sea throughout our kingdoms of England and Ireland, in our dominions aforesaid, . . ." (Emphasis supplied)

Indeed, Holdsworth, in referring to the nineteenth century English legislation⁶ which provided that the admiralty courts should have jurisdiction of damage done by or to a ship, so as to include damage to shore structures, has said, "Modern legislation has restored to the court of Admiralty many of the powers, and much of the jurisdiction of which it had been deprived in the seventeenth century."⁷

The Vice Admiralty courts of the American colonies had similarly known no such restrictions as were applied, following Lord Coke, in the mother country but

⁶ Admiralty Court Act, 1861, 24 Vict., c. 10, § 7, and earlier forms of the same provision from 1840 on. 3 & 4 Vict., c. 65; 9 & 10 Vict., c. 99; 17 & 18 Vict., c. 104. See also 31 & 32 Vict., c. 71.

⁷ 1 Holdsworth, *History of English Law*, (3d ed., 1922) 558.

had instead been given the full historic admiralty jurisdiction over damages done by ship to shore. The extent of this colonial jurisdiction the Supreme Court in *Waring v. Clarke*, (1847) 5 How. 441, 457, expressly recognized as having been in contemplation by the framers of the Constitution. Its extension to include shore damage is shown by the commissions of the colonial judges. Thus the commission of Lord Cornbury, Governor of New York, Connecticut and New Jersey, as Vice-Admiral in 1701, including the following (4 Benedict, *Admiralty*, (6th ed., 1940) 410-411):

And we do hereby remit and grant unto you, the aforesaid Edward, Lord Cornbury, our power and authority in and throughout our provinces and colonies, aforementioned, and the territories depending thereon, and maritime parts whatsoever of the same and thereto adjacent, and also throughout all and every the *sea shore*, public streams, ports, fresh water rivers, creeks, and arms, as well as of the sea, as of the rivers and *coasts* whatsoever of our said provinces and colonies, and the territories depending thereon, and maritime parts whatsoever of the same and thereto adjacent, as well within liberties and franchises, as without.

. . . and generally, in all and singular all other causes, suits, crimes, offences, excesses, injuries, complaints, misdemeanors, or suspected misdemeanors, trespasses, regrating, forestalling and maritime businesses whatsoever, throughout the places aforesaid, within the maritime jurisdiction of our Vice-Admiralty of our provinces and colonies aforesaid, and the territories depending thereon by sea or water, *on the banks or shores of*

the same howsoever done, committed, perpetrated, or happening. (Emphasis supplied.)⁸

The commission of 1762 to the Hon. Richard Morris, as judge of the vice-admiralty courts for the same colonies as the above, reads in part (4 Benedict, *Admiralty* 428-429):

. . . hereby granting unto you the full power to take cognizance of, and proceed in all causes civil and maritime, . . . or which do anyways concern suits, trespasses, injuries, . . . or injury whatsoever, done or to be done as well in, upon, or by the sea, or public streams, or fresh waters, ports, rivers, creeks, and places overflowed whatsoever, within the ebbing and flowing of the sea, or high water mark, *as upon any of the shores, or banks adjoining* to them or either of them, . . . (Emphasis supplied.)

Moreover, judicial precedents aside, no tort can well be conceived of which is as matter of fact more maritime than damages inflicted by a ship upon jetties, wharves and other aids to navigation and maritime commerce.⁹ As Mr. Justice Holmes well observed in *The Blacksheath*, (1904) 195 U.S. 361, 365, it is abundantly plain that "The precise scope of admiralty jurisdiction is not a matter of obvious principle or of very accurate history." And since it cannot be supposed that the framers of the Constitution con-

⁸ For the same wording as to the jurisdiction of the governor of the royal province of New Hampshire see *De Lovio v. Boit*, *supra*, fn. 46, p. 442.

⁹ Thus the Supreme Court has declared that not merely jetties but wharves "are essential aids to navigation." *Atlee v. Packet Co.*, (1874) 21 Wall. 389, 393.

templated that the American admiralty law should remain immutable, Congress has the paramount power to fix and determine the jurisdiction within the factual limits of matters maritime just as it has power to alter, qualify and supplement admiralty law as experience and changing conditions may require. *The Thomas Barlum*, (1934) 293 U.S. 21, 43; *United States v. Flores*, (1933) 289 U.S. 137, 148. In the words of Holmes in *The Blackheath*, *supra* (pp. 364, 367), "it would be a strong thing to say that Congress has no constitutional power to give the admiralty here as broad a jurisdiction as it has in England or France" for "very little history is sufficient to justify the conclusion that the Constitution does not prohibit what convenience and reason demand." To the same effect see *American Bridge Co. v. The Gloria O*, (E.D. N.Y., 1951) 98 F. Supp. 71; *Mene Grande Oil Co. v. United States*, (S.D. N.Y., 1950) 94 F. Supp. 26; *All American Cables v. The Dieppe*, (S.D. N.Y., 1950) 93 F. Supp. 923; and compare *Strika v. Netherlands Ministry*, (2d Cir., 1951) 185 F. 2d 555, 558, with *Vega v. United States*, (S.D. N.Y., 1949) 86 F. Supp. 293, *aff'd* (2d Cir., 1951) 191 F. 2d 921. See also *The Nanking*, (N.D. Calif., 1923) 292 Fed. 642; *The Oconee*, (E.D. Va., 1921) 280 Fed. 927, 931-933.

Finally, if there could ever have been doubt on the point in the earlier days, it is now put at rest by Mr. Justice Hughes in *The Thomas Barlum*, (1934) 293 U.S. 21, 52, where he said:

The authority of the Congress to enact legislation of this nature was not limited by previous

decisions as the extent of the admiralty jurisdiction. We have had abundant reason to realize that our experience and new conditions give rise to new conceptions of maritime concerns. These may require that former criteria of jurisdiction be abandoned, as, for example, they were abandoned in discarding the doctrine that the admiralty jurisdiction was limited to tidewaters.

Thus, we submit that the constitutional power of Congress to provide for suit in admiralty under both the Rivers and Harbors Act, 1899, and the Admiralty Extension Act, 1948, cannot be questioned.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the decision below should be reversed and the cause remanded with instructions that the court below exercise in this case the admiralty jurisdiction granted it by 28 U.S.C. 1333.

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JANUARY 1952.

United States
COURT OF APPEALS
for the Ninth Circuit

UNITED STATES OF AMERICA,

Libellant-Appellant,

v.

MATSON NAVIGATION COMPANY, a Corporation;
W. R. ECKHART, TUG LOUIE III, Her Boilers,
Engines, Tackle, Apparel, Furniture, etc., and WEST-
PORT TOWBOAT COMPANY, a Corporation,

Appellees.

On Appeal from the United States District Court for the
District of Oregon.

APPELLEES' BRIEF

FILED

MAR 17 1952

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FRANK MCK. BOSCH,

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Appellees.

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CLERK

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United States
COURT OF APPEALS
for the Ninth Circuit

UNITED STATES OF AMERICA,

Libelant-Appellant,

v.

MATSON NAVIGATION COMPANY, a Corporation;
W. R. ECKHART, TUG LOUIE III, Her Boilers,
Engines, Tackle, Apparel, Furniture, etc., and WEST-
PORT TOWBOAT COMPANY, a Corporation,

Appellees.

On Appeal from the United States District Court for the
District of Oregon.

APPELLEES' BRIEF

STATEMENT

It is felt that a more comprehensive statement of the case as disclosed by the record would clarify the issues and correctly delineate the questions before this court on appeal.

The appellant United States of America, hereinafter referred to as United States, is owner of the dredge Mult-

nomah. It also owns and maintains a certain dike or jetty constructed of piling extending northerly from the Oregon shore in the lower Columbia River near Westport Bar. Appellee Matson Navigation Company, hereinafter referred to as Matson, was operator of the SS HARDY which at the time of the occurrence involved in this appeal was being piloted by appellee Eckhart, a Columbia River Pilot. Westport Towboat Company, hereinafter referred to as Westport, is owner and claimant of Tug LOUIS III, both likewise appellees herein.

In the early evening of December 21, 1946, appellant's dredge was at anchor in the channel of the Columbia River in the vicinity of Westport, Ore. Shortly before 6:30 P.M. Westport's Tug with raft in tow was proceeding downstream and allegedly, while proceeding on the course which it followed, failed to clear the dredge and with its tow fouled the dredge, the donkey scow and pipeline. At the time of or shortly after this occurrence, the SS HARDY, with the respondent Eckhart at the conn as pilot, proceeded on a course likewise downstream in the channel attempting to pass dredge, tug and tow and in doing so collided with the dike.

To recover damages and penalties the appellant filed its libel in admiralty in the U. S. District Court for the District of Oregon.

The libel contains two counts, and joins as respondents in personam in both counts Matson, the Pilot and Westport, together with the Tug LOUIS III in rem.

The first count of the libel asserts that the collision between the tug and dredge was due to the fault of the

tug and that the collision between the SS HARDY and the dike was proximately caused by the joint negligence and fault of all the named respondents including the tug.

The libel asserts damages to the dike at \$7,567.50 and damages to the dredge and scow at \$600.45.

The second count of the libel is based on the Rivers & Harbors Act of 1899, a penal statute, 33 U.S.C. 408-412. This count is void of any charge of wilfulness, neglect or fault, either several or joint but describes two separate and distinct collisions, one between the tug and the dredge and the other between the SS HARDY and the dike.

The libel concludes with a prayer for relief including damages to the dike, damages to the dredge and penalties by decree against all of the named respondents, including the tug.

In accord with the prayer of the libel, the Tug LOUIS III was arrested and later was released on stipulation in the sum of \$10,000.00. The SS HARDY was not arrested.

Subsequent to the release of the tug to claimant, exceptions to the libel were filed by all respondents (R. 16-20). Thereafter, a preliminary Pre-trial Order was made and approved (R. 20-26) confining the issues substantially to those raised by exception. Hearing was had resulting in the opinion of the court followed by formal order which decreed first that the Admiralty Extension Act of June 19, 1948 had no retroactive application, that the court sitting in admiralty had no jurisdiction of the tort resulting in damages to the dike, that the court sitting in admiralty had no jurisdiction to entertain the claim for penalties under the Act of 1899, dismissed the libel as to

respondents Matson and Eckhart and also dismissed the libel as to the claimant Westport and Tug LOUIE III insofar as damages to the dike were concerned and finally allowed libellant 20 days to amend its libel confining its claim to the damage to the dredge and its equipment.

Appellant in its brief urges that the Admiralty Extension Act is to be retroactively construed and further, that the same Act is to be construed in such manner as to give admiralty jurisdiction of the penal provisions of the Rivers and Harbors Act of 1899. Appellant also urges the constitutionality of both acts.

A review of the record will disclose that the lower court made no determination as to the validity of the Admiralty Extension Act of June 19, 1948 (46 U.S.C.A. §740) nor did the court make any determination as to the constitutionality or validity of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §412).

POINTS RELIED UPON BY APPELLEES

Briefly stated, the position of all appellees on this appeal is:

(1) The Admiralty Extension Act of June 19, 1948 (46 U.S.C.A. §740) is to be prospectively construed and has no retroactive application.

(2) Prior to the effective date of the Admiralty Extension Act the jurisdiction of admiralty did not extend to the penalty provisions of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §407-412), insofar as shore structures are concerned.

(3) An action in tort for negligent navigation cannot be joined with an action to recover the penalty as attempted in this proceeding.

(4) In the absence of wilfullness, no action to recover penalty in personam lies under the provisions of the Rivers and Harbors Act of 1899.

(5) No action in rem lies against the tug under the Rivers and Harbors Act of 1899.

ARGUMENT

I. ADMIRALTY EXTENSION ACT OF JUNE 19, 1948 IS TO BE PROSPECTIVELY CONSTRUED AND HAS NO RETROACTIVE APPLICATION EXCEPT IN THOSE TYPES OF CASES FOR WHICH THE STATUTE EXPRESSLY PROVIDES.

The Act in its entirety is as follows:

“§740. Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period.

“The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

“In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: PROVIDED, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in

Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948 and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act. PROVIDED FURTHER, That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage. June 19, 1948, c. 516, 62 Stat. 496." 45 U.S.C.A. 749.

LEGISLATIVE HISTORY

For a long period of time bills had been presented to Congress to extend jurisdiction of admiralty to collisions involving damage to shore structures. In 1932 the courts intimated that Congress had power to pass this type of statute. (See *Taylor v. Lawson* (D.C.S.C. 1932), 50 F. (1d) 165), and with this we do not take issue.

Appellant urges that not only is the Act a purely procedural or remedial statute and is therefore to be retroactively construed, but states also that Congress, by failing to adopt the particular amendment which was suggested by the Attorney General's Department, thereby intended that the Act have retrospective application.

It will be observed that the language which appellant inserts in his brief is only a part of a paragraph included in the Attorney General's letter. That paragraph in its entirety appears as follows:

"In extending the remedy in admiralty, the right of claimants to proceed against the United States by civil action will be abolished as a result of §421 (d) of the Tort Claims Act of 1948. In order to avoid conflict or uncertainty, it is suggested that the bill

be amended to indicate that it is to apply only to suits instituted after its adoption. This may be accomplished by insertion, after the word 'that' in line 3, of the words 'hereafter the exercise of.'" U. S. Cong. Serv. 1948, p. 1904.

There also appears in the legislative history of the Act very serious doubt as to whether or not a new cause of action is created by the Act. Appellant urges that it does not and again quotes from the Attorney General's letter. However, there is included in the House and Senate report a letter by the Secretary of Navy which includes the following language:

"Both under the Suits in Admiralty Act and under the Public Vessels Act, passage of the pending bill would create a cause of action in admiralty not hitherto existing." U. S. Cong. Serv. 1948, p. 1901.

Appellant in its brief, obviously employing innuendo, fails to quote the Act in its entirety. The first proviso of the Act in the second paragraph deals with suits against the United States. It is obvious from the paragraph of the Attorney General above quoted that it was this class of cases, namely, suits against the United States, which the Attorney General had in mind in making his suggestion. It is further apparent from reading the proviso that the substance of the suggestion as made by the Attorney General is presently included in the Act, although the identical language suggested by the Attorney General was not used by Congress. The language which Congress employed is that as suggested by the Secretary of the Navy. See U. S. Cong. Serv. 1948, p. 1902.

CASES CITED BY APPELLANT

In support of its contention that the Admiralty Extension Act is to be retrospectively construed, appellant cites a number of cases, see App. Br. pp. 10-11. A careful review of these decisions discloses that they fall into two distinct classes. Either they involve purely procedural changes or they involve jurisdictional changes that do not eliminate trial by jury or available defenses.

Ex Parte Collett (1919), 337 U.S. 55, dealt with the amendment to the venue statute with respect to its application to the Federal Employers Liability Act.

Crane v. Hahlo (1922), 258 U.S. 142, involved a change in New York City's Charter which gave the decision of the municipal body in its award of damages to a property owner for construction of an adequate viaduct, the aspect of finality. It saved and did not eliminate court review but limited the review to fraud or abuse of discretion.

Chase Securities Co. v. Donaldson (1945), 325 U.S. 304, held that a modification of a statute of limitations was to be given retrospective effect. It did not deal with enlargement of jurisdiction nor the elimination of jury trial.

Carpenter v. Wabash Railway Co. (1940), 309 U.S. 23, where the railroad was being operated under section 77 of the Bankruptcy Act, held that a modification of the General Order affecting priority of claims for injury to employees was retrospective.

As to enlargement of jurisdiction appellant cites *Larkin v. Saffrans*, 15 Fed. 147. This was an action in the nature of a declaration in ejectment based by plaintiff

upon a certificate of tax sale made under Acts of Congress for the sale of lands subject to the direct tax and situated within the insurrectionary districts. During the pendency of the suit, the Act of March 3, 1875 (18 Stat. 470) was passed giving the United States Circuit Courts original jurisdiction over various actions including those arising under the laws and constitution of the United States.

True, the court held the act to be retrospective in effect. However, included in the opinion is the following language:

“That congress has the power to bestow jurisdiction over a pending suit there can be no doubt whatever *if the act says so in terms.*” (Emphasis added.) (P. 148)

The internal revenue laws which were the basis of the tax-title had been passed in 1833. Both parties were citizens of Tennessee. The action was commenced in the Federal courts prior to the passage of the 1875 act. The court permitted the declaration to be amended so as to include the jurisdictional averments as to the Federal Revenue Laws. Elimination of jury trial or available defenses were not involved.

United Wall Paper Factories, Inc. v. Hodges (C.A.A. 2 1934) 70 F (2d) 243 was a case which arose on application for discharge in bankruptcy. Objecting creditor, United Wall Paper Factories Inc. appealed from an order striking specifications on ground that the general order had been amended by the Supreme Court to requiring filing of objections within 10 days after discharge had been granted.

The court states:

"There can be no doubt that the amendment applied to pending cases; it was a mere change in procedure of far less consequence than the amendments held to apply presently in *Lockhart v. Edel*, 23 F. (2d) 912 (C.C.A. 4): * * * It is the general doctrine that amendments touching only procedure apply to pending actions." (p. 244)

In support of this doctrine the court cites *Larkin v. Saffrans*, *supra*.

In *Cobleigh v. Epping Brick Co.* (D.C.N.H. 1949) 85 F. Supp. 862, plaintiff on April 7, 1949, filed a writ of attachment in the state court stating defendant to be a N. H. corporation and \$5,000.00 was involved. On May 19, 1949 plaintiff amended the writ showing defendant to be a Maine Corporation. On May 24, 1949 congress amended 28 U.S.C.A. 1446 so as to read "(b) if the case stated by the initial pleading is not removable, a petition for removal may be filed within 20 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, etc. * * * from which it may be first ascertained that the case is one which is or has become removable."

On May 25 defendant filed its petition for removal and the court denied the motion to remand holding the case to be within the terms of the statute.

In *United States v. Kelly*, 97 Fed. 460 (9th Cir. 1899), plaintiff sued United States in District Court to recover a salary or fee. On appeal the case was reversed and remanded to the District Court. Shortly before, Congress had amended the Jurisdiction statutes by adding: "The jurisdiction hereby conferred * * * shall not extend to cases brought to recover fees, salary, etc." leaving those

cases within the jurisdiction of the court of claims. On motion, the mandate to the District Court was recalled and the case dismissed for the reason that the amendment was in effect a repealing clause.

The availability of the statute of limitations to other pending claims of like nature was considered and held to result in harshness in some instances. However, the change in the statute certainly did not operate to eliminate or enlarge the defense of limitation, which incidentally rested with the government and not the claimant to the suit, nor did it modify or eliminate any other available defense or basis for prosecuting the claim.

Insurance Co. v. Richie (1866), 5 Wall. (U.S.) 541 was an action by plaintiff against the internal revenue agent to collect illegally paid taxes. Both were citizens of Massachusetts. Jurisdiction had been conferred by Act of 1864. The court held the Act of 1866 took away that jurisdiction and suit was dismissed for want of jurisdiction.

Although appellant urges that there can be no dispute that, absent a clear expression of contrary intent, a statute conferring jurisdiction will be given retrospective effect, the authorities do not support that position, particularly when elimination of jury trial or defenses such as contributory negligence results.

THE ADMIRALTY EXTENSION ACT IS TO BE PROSPECTIVELY CONSTRUED

Only one decision has been rendered holding that the Admiralty Extension Act of 1948 is to be retroactively construed. *All America Cables & Radio Inc. v. The Dieppe*,

93 F. Supp. 923, was decided in 1950 by the District Court for the Southern District of New York and is cited in appellant's brief. There the vessel, prior to enactment of the statute, dragged her anchors over the marine cables of libellant in Curacao, Netherlands West Indies. The court denied a motion to dismiss the libel holding the statute to have retroactive application. However, the decision does not rest on that point alone for the court states that if, as was indicated, a maritime lien against the vessel existed under Curacao law, such lien could be enforced in the New York court.

It must be borne in mind that at the time of the collision in the case at bar, respondents, insofar as damage to the dike is concerned, had a right to trial by jury and also the right to plead contributory negligence as a bar to any proceeding which appellant may have instituted. If the Admiralty Extension Act is to be retroactively construed, then respondents are deprived of these rights.

It must be further borne in mind that as to shore structures, the Admiralty Extension Act reaches geographically to an area or appurtenance that theretofore was not within the admiralty jurisdiction. In this connection it does not create a new remedy. On the contrary the act specifically states the remedy is to be unchanged and must conform to the principles of law and rules of practice obtaining in admiralty. In effect, the act gives a right to sue in admiralty for injury formerly cognizable only at law. Insofar as the history of admiralty is concerned since the adoption of our Constitution, the right to so sue is new.

It is an elementary rule of construction that statutes are to be prospectively construed unless language in the statute is expressly to the contrary or there is necessary implication to that effect. *Fullerton-Krueger Lumber Co. v. Northern Pac. R.R. Co.*, (1925) 266 U.S. 435, 45 S. Ct. 143; *Brewster v. Gage* (1930), 280 U.S. 327, 50 S. Ct. 115; *Hassett v. Welch* (1938), 303 U.S. 303, 58 S. Ct. 559.

In considering the elimination of available defenses, the theories underlying the reason for the rule are not entirely uniform. Some cases hold that to construe a statute retroactively so as to deprive a suitor of an available defense would render the statute invalid as being violative of the due process clause of the Fourteenth Amendment to the Federal Constitution. Other cases follow the general rule of statutory construction and hold the statute to be prospective unless a retroactive effect is clearly expressed by the enacting body. See *Valleytown Tp. v. Women's Catholic Order of Foresters* (1940 C.C.A. 4), 115 F. (2d) 459.

Congress has from time to time enacted legislation extending admiralty jurisdiction and in so doing has obviously borne in mind the above elementary principles of law.

In passing the Carriage of Goods by Sea Act (1936), 49 Stat. 1207; 46 U.S.C.A. 1300 et seq. it provided expressly for retrospective effect in certain circumstances (see sec. 1314).

The Longshoremen's and Harbor Workers Comp. Act (1927) (44 Stat. 1424), 33 U.S.C.A. 901 included in the amendment of June 24, 1948 an express provision that it

apply only to death or injuries occurring after the effective date of the act.

Other enactments extending admiralty jurisdiction have not included provisions expressing either a prospective or retrospective intent. In all instances the courts have construed them prospectively.

The Act of June 23, 1910 c. 373, (36 Stat. 604) extended admiralty jurisdiction to enforce liens on vessels for supplies and repairs. In *The Saratoga* (C.C.A. 2, 1913), 204 Fed. 952, Cert. Den. 229 U.S. 623, 33 S. Ct. 1050, where the repairs had been made in 1907 the court held the statute must be prospectively construed and permitted no recovery.

The Harter Act, Feb. 13, 1893 (27 Stat. 445) extended admiralty jurisdiction to relieve shipowners from liability for negligent navigation of their vessels if they used due diligence to make their vessels seaworthy. In *Humboldt Lumber Manufacturers Ass'n v. Christopherson* (1896 C.C.A. 9) 73 Fed. 239, it was held that the act had no effect, the loss having taken place in 1889.

In 1886 Congress amended the Limitation of Liability Act of 1851 extending admiralty jurisdiction so as to permit limitation of liability for losses occurring in connection with vessels navigated on rivers and lakes and further, to include barges and lighters. Act of June 19, 1886, c. 421, (24 Stat. 80), 46 U.S.C.A. 188. In *Chappell v. Bradshaw*, (C. C. Md. 1888) 35 Fed. 923, it was held that the amendment was not to be applied retroactively so as to permit limitation for the loss occurring in 1885.

In 1920 Congress enacted the Jones Act. (41 Stat.

1007), 46 U.S.C.A. 688. This act gave a right of action to seamen for injuries or death occurring in the course of their employment and, by reference to the Employers Liability Act, certain defenses were eliminated. In the extensive litigation which followed the catastrophe to the Steamship Princess Sophia in 1918 on Vanderbilt Reef, Alaska, resulting in the loss of all passengers and crew, it was contended that by reason of the above enactment the shipowners were precluded from limiting their liability for loss of the crew. In the *Petition of Canadian Pac. Ry. Co.* (D.C.W.D. Wash. 1921), 278 Fed. 180 p. 197, the court stated that the act was not to be given retroactive effect.

Pertinent to the issue at bar are the comments of Justice McKenna concerning the Employers Liability Act in *Winfree v. Northern Pacific Ry. Co.*, 227 U.S. 296, 33 S. Ct. 273, holding the statute to have no retroactive application.

“It is hardly necessary to say that such statutes are exceptions to the almost universal rule that statutes are addressed to the future, not to the past. They usually constitute a new factor in the affairs and relations of men, and should not be held to affect what has happened unless, indeed, explicit words be used, or by clear implication that construction be required. It is true that it is said that there was liability on the part of the defendant for its negligence before the passage of the act of Congress, and the act has only given a more efficient and a more complete remedy. *It, however, takes away material defenses,—defenses which did something more than resist the remedy; they disproved the right of action.* Such defenses the statute takes away, and that none may exist in the present case is immaterial. It is the operation of the statute which determines its charac-

ter. The court of appeals aptly characterized it, and we may quote from its opinion: *'It is a statute which permits recovery in cases where recovery could not be had before, and takes away from the defendant defenses which formerly were available,—defenses which, in this instance, existed at the time when the contract of service was entered into and at the time when the accident occurred.'* Such a statute, under the rule of the cases, should not be construed as retrospective. It introduced a new policy and quite radically changed the existing law." (Emphasis added.)

A commentary on the Winfree case and others dealing with similar problems is found in Crawford, *The Construction of Statutes* (1948), page 586 where it is said:

"But, as in the case of procedural statutes, oftentimes the right and remedy are so closely connected that any alternative in the remedy may adversely affect the right. Such was true in the Winfree v. Northern Pacific Railway Co. [With citation and a quotation from the opinion substantially as above.]

"Where this is the case, of course, the rule against retroactive operation should naturally be applied, and usually such cases arise where the statute involved creates both the right and the remedy."

To the same effect is the statement found in *Berkovitz v. Arbib & Houlberg*, 230 N.Y. 261, 130 N.E. 288 (cited in Appellants' Brief, page 10): "The word 'remedy' itself conceals at times an ambiguity, since changes of the form are often closely bound up with changes of substance."

In *Turner Terminals, Inc. v. United States* (C.C.A. 5 1950) 177 F. (2d) 844, the terminals company filed libel in personam and in rem for damages to its dock caused by government's vessel when it broke loose from its moorings on May 20, 1946. The libel was filed in May, 1948. In

both lower and appellate courts it was contended, as in the case at bar, that by virtue of the Admiralty Extension Act of June 19, 1948 the court had jurisdiction in admiralty over damage to shore structures and that notwithstanding the previous decisions holding to the contrary (The Plymouth 1866, 3 Wall (U. S.) 20, 18 L. Ed. 125; Cleveland Terminal & Valley R.R. Co. v. Cleveland Steamship Co. (1908), 208 U.S. 316, 28 S. Ct. 414; The Admiral Peoples, 295 U.S. 649, 55 S. Ct. 885) admiralty always had jurisdiction over damages to shore structures, and that by virtue of the retrospective effect which must be given the Extension Act the admiralty court necessarily had jurisdiction of the matter at the time of hearing. Both the District Court and Appellate Court rejected this argument, the latter stating:

“As shown above, it is clear that in the state of the law prior to June 19, 1948, the court was without jurisdiction of appellant’s claim.” (p. 846)

In *Vega v. United States*, 86 F. Supp. 293 (Aff’d. (2d Cir., 1951) 191 F. (2d) 921), the court, after acknowledging that—

“Until the enactment [of the Admiralty Extension Act, 1948] a tort was within the admiralty jurisdiction of the United States courts only if the injury was done on navigable waters, or on some part of a vessel floating on navigable waters but not if it was done on land even by a vessel on navigable waters”;

went on to state:

“Under the well established rule of statutory construction it appears that Congress by making express provisions for retroactive operation of the statute in but one class of cases intended the statute to operate

only prospectively in all other cases. *Continental Casualty Co. v. United States*, 314 U.S. 527, 533, 62 S. Ct. 398, 86 L. Ed. 426 * * * The legislative history of the statute sustains this conclusion."

While the court in both the *Vega* and *Turner Terminals* cases was concerned only with the prospective effect of the Admiralty Extension Act in cases brought against the United States, it would seem not illogical that the same rule would apply to private litigants. Indeed, it would be unjust to interpret the Extension Act as being prospective as to the United States but retrospective as to private citizens.

II. PRIOR TO THE EFFECTIVE DATE OF THE ADMIRALTY EXTENSION ACT OF JUNE 19, 1948, ACTIONS FOR THE RECOVERY OF DAMAGES TO SHORE STRUCTURES WERE EXCLUSIVELY AT LAW, WHETHER FOR THE RECOVERY OF DAMAGES UNDER THE NAVIGATION STATUTES OR FOR PENALTIES UNDER THE RIVERS AND HARBORS ACT OF 1899.

The pertinent provisions of the statutes to the case at bar are as follows:

"§408. Taking possession of, use of, or injury to harbor or river improvements. It shall not be lawful for any person or persons to take possession of or make use of for any purpose, or build upon, alter, deface, destroy, move, injure, obstruct by fastening vessels, thereto or otherwise, or in any manner whatever impair the usefulness of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States, or any piece of plant, floating or otherwise, used in the construction of such work under the control of the United States, in whole or in part, for

the preservation and improvement of any of its navigable waters or to prevent floods, or as boundary marks, tide gauges, surveying stations, buoys, or other established marks, nor remove for ballast or other purposes any stone or other material composing such works: PROVIDED, That the Secretary of War may, on the recommendation of the Chief of Engineers, grant permission for the temporary occupation or use of any of the aforementioned public works when in his judgment such occupation or use will not be injurious to the public interest. (Mar. 3, 1899, c. 425, §14, 30 Stat. 1152.)”

“§411. Penalty for wrongful deposit or refuse; use of or injury to harbor improvements, and obstruction of navigable waters generally. Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections 407, 408, and 409 of this chapter shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding \$2,500 nor less than \$500, or by imprisonment, (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction. (Mar. 3, 1899, c. 425, §16, 30 Stat. 1153.)”

“§412. Liability of masters, pilots, and so forth, and of vessels engaged in violations.

“Any and every master, pilot, and engineer, or person or persons acting in such capacity, respectively, on board of any boat or vessel who shall knowingly engage in towing any scow, boat, or vessel loaded with any material specified in section 407 of this title to any point or place of deposit or discharge in any harbor or navigable water, elsewhere than within the limits defined and permitted by the Secretary of the Army, or who shall willfully injure or destroy any work of the United States contemplated in section 408 of this title, or who shall wilfully injure or destroy any work of the United States contemplated

in section 408 of this title, or who shall wilfully obstruct the channel of any waterway in the manner contemplated in section 409 of this title, shall be deemed guilty of a violation of sections 401, 403, 404, 406, 407, 408, 409, 411-416, 418, 502, 549, 686, 687 of this title, and shall upon conviction be punished as provided in section 411 of this title, and shall also have his license revoked or suspended for a term to be fixed by the judge before whom tried and convicted. And any boat, vessel, scow, raft, or other craft used or employed in violating any of the provisions of sections 407, 408, and 409 of this title shall be liable for the pecuniary penalties specified in section 411 of this title, and in addition thereto for the amount of the damages done by said boat, vessel, scow, raft, or other craft which latter sum shall be placed to the credit of the appropriation for the improvement of the harbor or waterway in which the damage occurred, and said boat, vessel, scow, raft, or other craft may be proceeded against summarily by way of libel in any district court of the United States having jurisdiction thereof. Mar. 3, 1899, c. 425, §16, 30 Stat. 1153, amended July 26, 1947, c. 343, Title II, §205(a), 61 Stat. 501."

Counsel for appellant, with its confusing and misleading arrangement of authorities, citations and quotations (App. Br. pp. 11-14) seeks to lead this court to believe that for a long period of time prior to the passage of the Admiralty Extension Act of June 19, 1948, the penalty and damage provisions of the Rivers and Harbors Act of 1899 as to shore structures were within the Admiralty jurisdiction. This contention cannot be sustained. It has previously, on numerous occasions, been urged but has consistently been rejected.

In 1865 the Supreme Court first considered the question of jurisdiction of damage to shore structures by ves-

sels. In *The Plymouth*, 3 Wall. (U.S.) 20, 18 L. Ed. 125, the proceeding was in admiralty in rem to recover for damages to a wharf which had been caused by a negligently started fire on the vessel which was berthed there. The court acknowledging the "great care and research" on part of libelant's counsel held nevertheless the cause to be "outside the acknowledged limit of admiralty cognizance over maritime torts."

Other cases followed with variations in the facts and in the type and use of the structure involved.

Admiralty was held to have jurisdiction where a beacon constructed on pile near the river channel was damaged. *The Blackheath* (1904), 195 U.S. 361, 25 S. Ct. 46. And later it was held that admiralty also had jurisdiction of a similarly situated beacon under construction. *Latta and Terry Construction Co. v. The Raithmoor* (1916), 241 U.S. 166, 36 St. Ct. 514.

In 1925 the Supreme Court specifically held that a dike extending from shore, built and maintained for the purpose of deepening the river channel, was not an aid to navigation and consequently an action in rem for damage caused by a vessel was not within admiralty jurisdiction. *United States v. The Panoil* (1925), 266 U.S. 433, 45 S. Ct. 164. This case was the basis of the ruling by 5th Circuit in the *Gansfjord* case, *infra*. The structure there involved was identical as to locality with respect to channel, nature of the structure and purpose of maintenance as is the structure involved in the case at bar. In *The Panoil* case the court states that the mere fact that the dike's presence may affect the flow of water and ulti-

mately aid navigation did not bring the injury within the admiralty jurisdiction.

Appellant cites a number of cases which it asserts support its contention. In *The Betsy and Charlotte* (1808), 4 Cranch, 443, the statute prohibited vessels from trading at San Domingo. For violations the government, in accord with the statute, made seizure of them on navigable waters. Likewise in *The Scow 6-S* (1919), 250 U.S. 269, the violation of the statute prohibiting dumping in New York Harbor was committed and the scow libeled on navigable waters. It goes without argument that enforcement of a seizure statute or enforcement of a penalty statute, which statutes are directed to things or occurrences on navigable waters, is within the admiralty jurisdiction.

A chronological review of *The Gansfjord* case in its progress through the courts certainly does not lead to the conclusion that proceedings under the Rivers and Harbors Act to recover penalty and damages for injury to a shore structure of the United States, are or have been within the admiralty jurisdiction.

The Gansfjord (D.C. La. 1927), 17 F. (2d) 613, was a case commenced by the United States by libel to recover damages and penalties for injury to a jetty as in the case at bar. On exception to the libel on the ground that it was improperly brought in admiralty the court expressly stated that it was persuaded by the ruling in *The Panoil*, supra, to dismiss the libel. However, it distinguished the proceeding on the basis that it was a statutory penalty proceeding and not one for the recovery of ordinary dam-

ages and overruled the exceptions on the authority of *The Scow* 6-S supra.

Later, in the trial on the merits, *The Gansfjord* (D.C. La. 1928), 25 F. (2d) 736, a jury was tendered but was waived by stipulation. The court there moderates substantially its former opinion stating:

"In overruling these exceptions I contemplated the libel of information as a proceeding sui generis in character, deriving its sanction directly from the terms of the act in question. I cannot see what the constitutional declaration, that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction, has to do with the distribution of that jurisdiction by congress as it alone may decide." (pp. 736-7.)

The court further recognized in its opinion the waiver of a jury trial. On appeal, *Aktieselskabet Dampskib Gansfjord v. United States* (5th Cir. 1929), 32 F. (2d) 236, the court disposes of the question of admiralty jurisdiction in unequivocal terms.

"The injury alleged being to a structure which is to be regarded as land *was not cognizable in a court of admiralty* (citing *The Panoil*). The libel did not purport to be one in admiralty, being filed on the law side of the court, and a jury being waived by written agreement of the parties." (pp. 236-7.) (Emphasis supplied.)

Certioari was denied. 280 U.S. 578, 50 S. Ct. 32.

In *The Barbara Cates* (D.C. Pa. 1936), 17 F. Supp. 241, involving damage to a dike extending into the Delaware River, the court, expressly disagreeing with the Court of Appeals in the *Gansfjord* case, follows the rea-

soning of the District Court but definitely modifies its conclusions by stating:

"The respondent was bound * * * to claim its right to a jury, if it meant to insist upon it; for a jury trial is not in civil cases a constitutional necessity; a defendant may lose it by inaction."

and

"I am satisfied that * * * the counterclaim or cross-action could be maintained either at law or in admiralty."

and in support of the above misconception, as to admiralty, the court states:

"In the present case, even if the libel could be treated as on the law side, I think the claimant would have also clearly waived his right to jury trial." (See page 244.)

From the foregoing it can fairly be assumed the court would also erroneously have entertained a plea of contributory negligence as a complete bar to the proceeding in admiralty had the claimant tendered one.

It is worthy of note that in three or four later decisions, cited in appellant's brief, *The Barbara Cates* was cited but was not followed.

In *United States v. Mount Parnes* (D.C. N.Y. 1941), 1942 A.M.C. 223, the libel was by the United States in Admiralty for damage to a government jetty under the Rivers and Harbors Act. The court, without doing more than citing a few of the leading cases including *The Gansfjord*, supra, and *The Panoil*, supra, as well as *The Barbara Cates*, sustained the exceptions to the libel. Important too is the fact that the government served notice of appeal but later withdrew it.

In *The Dixie* (D.C. Tex. 1941), 39 F. Supp. 395, the United States libeled the vessel under the Rivers and Harbors Act of 1899 to recover damages for injury to a bridge built and maintained by the Department of Agriculture in connection with one of its experimental stations. The claimant of vessel moved for a summary judgment of dismissal which was granted. In previous proceedings the libel by the government was in admiralty under the navigation statutes and the proceedings likewise were dismissed. *The Dixie*, 30 F. Supp. 215.

Again in 1946, the government followed its "usual policy." In *United States v. The Republic No. 2* (D.C. Tex. 1946), 64 F. Supp. 373, the government's attempt to recover in admiralty the penalty for damage to flood gates and guide walls erected by the government at a point where the Intercoastal Waterway crosses the Brazos River, under the Rivers and Harbors Act of 1899, was abruptly halted by exceptions to the libel. Thereafter, but only by agreement of the parties, the cause proceeded on the law side as a civil action.

At least until the passage of the Admiralty Extension Act of 1948, recovery for damage to shore structures, including jettys and dikes, whether for ordinary damages under the navigation statutes or under the penal provisions of the Rivers and Harbors Act, was exclusively within the jurisdiction of the law courts and not in admiralty.

III. LIABILITY OF RESPECTIVE RESPONDENTS AND MISJOINDER.

From the foregoing, the contentions of appellant to the contrary notwithstanding, it follows that the cause of

action for damage to the dike and the cause of action for penalty are causes clearly at law. Moreover, it will be observed that the allegations in the libel are not sufficient to bring the respondents, who have been proceeded against in personam, within the penalty provisions of the Rivers and Harbors Act, there being no wilfulness alleged.

Further, the tug is not liable in rem for damage to the dike under the navigation statutes for reason that the matter is one exclusively at law. It is not liable in rem for damage to the dike under the penalty statutes for reason the matter is exclusively at law and also for reason that, as to the dike, it was not the offending thing. *The Watuppa* (D.C. N.Y. 1937), 19 F. Supp. 493.

It is further apparent that the tug is not liable in rem under the penalty statute for damage to the dredge for the reason that the dredge is not within those types or categories of structures which are defined in Section 408 of the Act.

(a) *Personal Liability for Penalty.*

As has been observed from the opinion in *The Scow 6-S* supra, admiralty under certain given circumstance has jurisdiction to enforce a penalty provision by a proceeding in rem against the offending vessel. The statute must pertain to and the occurrence take place on navigable waters. However, if the action is in personam for the enforcement and collection of the penalty, the proceeding must necessarily be at law because of the Constitutional preservation of the right to trial by jury.

Article II, Section 2 of the Constitution of the United States provides as follows:

"The Trial of all Crimes except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crime shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

18 U.S.C.A. 1 classifies offenses as follows:

"Notwithstanding any Act of Congress to the contrary:

"(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

"(2) Any other offense is a misdemeanor.

"(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than \$500, or both, is a petty offense." 62 Stat. 684.

Benedict on Admiralty, Sixth Ed., Vol. 4, p. 184, states the rule:

"If the suit is in personam to collect a penalty from some individual or corporation, the right to a jury trial exists in every instance because the suit should be on the common law side; * * *"

In *U. S. ex rel. Pressprich v. James W. Elwell & Co.* (2nd Cir. 1918), 250 F. 939; Cert. Den. 248 U.S. 564, 39 S. Ct. 8, the above rule is given support, the court stating:

"We think the District Court had no jurisdiction in admiralty over the collection of a penalty by proceedings in personam." (p. 941.)

That case involved the penalty provisions of the Harter Act and although the court by reason of waiver of the jurisdictional objection permitted the matter to proceed on the merits as a *qui tam* proceeding stated the rule

as above set forth citing in support thereof *Virginia etc. Co. v. U. S.*, Fed. Cas. No. 16,773. *McAfee v. The Creole*, Fed. Cas. No. 8,655; and *United States v. The Queen*, Fed. Cas. No. 16,107.

In re Scow No. 36 (1906 1st Cir.), 144 F. 932, the personal liability for penalties under the Rivers and Harbors Act was considered by the court. The opinion states:

"It is also quite apparent that the law-making power in framing the statute in question had regard to the distinction between the principles which govern admiralty forfeitures in rem and the principles which govern in proceedings to impose a penalty in personam against the owner."

and after quoting from the statute with reference to the use of well-known common law terms, continues:

"* * * thus unmistakably recognizing and intending tests of criminality which exist under general rules in proceedings against persons charged with misdemeanors;" (p. 935).

Among the reported opinions, we find no other decisions on the question and it is fair to assume that in no other instances has the government sought to enforce a penalty in personam by a proceeding which eliminates trial by jury. It is therefore conclusive that as to *Matson*, *Eckhart* and *Westport*, there can be no personal liability for the recovery of the penalty. Assuredly there is no misdemeanor charged as provided in section 411 of the act and there is no wilfulness charged as required by section 412.

(b) *In rem liability for penalty.*

As to the SS *HARDY* the libel charges damage and

injury to the dike. There is no charge that the Hardy injured the dredge nor is there any fault charged to her in contributing to the damage to the dredge. The SS HARDY was not arrested nor even named as a respondent in the libel and is therefore not liable for any penalty.

The Tug LOUIS III was arrested. However, she is not charged with being "used or employed" in connection with the damage to the dike under the penalty provisions of the Rivers and Harbors Act. Even though it be argued that the charge of mutual fault as to the dike damage should bring her within the quoted statutory language, she is still not liable in rem in Admiralty, the damage having been done to a shore structure. (See cases supra.)

Nor is the tug liable in rem under the penalty provisions for damage to the dredge. The statute is penal and of course is subject to the rule of strict construction. It specifically provides for and defines the structures coming within the purview of the act. 33 U.S.C.A. 408.

"It shall not be lawful for any person * * * to injure * * * any seawall, bulkhead, jetty, dike, levee, wharf, pier, or *other work built by the United States*, or any piece of plant, floating or otherwise, *used in the construction of such work* under the control of the United States, in whole or in part, for the preservation and improvement of any of its navigable waters * * * etc." (Emphasis supplied.)

The libel charges that libelant was the owner of the dredge, being a nonpropelled pipeline dredge, and "at all times herein alleged was a floating plant used in the construction of improvements of a navigable river of the United States, to wit: the Columbia River, and was an-

chored outside of and on the Washington side of the main channel, etc." (R. p. 4.)

The libel is void of any allegation that the dredge was being used in the construction of a jetty, dike, levee, wharf, pier, or other work built by the United States, unless it can be said that the deepening of the channel comes within the phraseology "or other work." We urge that it does not. A reading of the further provisions of the statute discloses that the "work" contemplated has reference to structures and the "plant, floating or otherwise" was intended to pertain to such equipment used in connection with the construction of such works. The further provisions of the statute make this clear, i.e.: "boundary marks, tide gauges, surveying stations, buoys, or other established marks, nor remove for ballast or other purposes any stone or other material composing *such works*." (Emphasis supplied.)

Here again we find no decisions holding a dredge anchored in the channel to be included within the objects enumerated in the penalty provisions of the Rivers and Harbors statute. (The dredge had not been digging for a number of days due to high water.) Indeed the dredge, being a float and movable, is governed by the navigation statutes. (Regulations governing lights, signals, whistles, etc. for dredges and pipelines, see Rule 3, 5, 7 and 8 under Section 2, Act of June 7, 1897 as amended.) In *The Dixie* supra, the court applied the strict rules of construction holding the bridge not to be included within the purview of the statute. *The Panoil*, supra held aid of the dike in deepening the channel did not bring the structure within the classification of an aid to navigation.

(c) *In personam liability under the navigation statutes.*

The Admiralty Extension Act having no retrospective effect, it follows that neither Matson, Eckhart, Westport Towboat Co. nor the Tug LOUIS III are liable for damage to the dike under the navigation statutes.

The libel does not charge the Matson Navigation Co., or the Pilot with any fault in connection with the damage to the dredge and they therefore are free from liability as far as dredge damage is concerned.

Westport as owner, operator and claimant of the Tug LOUIS III may properly be held liable in personam for the damage to the dredge and it now is settled without doubt that the tug may properly be proceeded against in rem for such damage. The lower court so held and dismissed as to all parties in connection with the dike damage and dismissed as to Matson and Eckhart in connection with the dredge damage. This ruling we urge is correct and the lower court should be affirmed.

(d) *Misjoinder of Causes and Parties.*

We urge further that the lower court in considering the effect of the apparent misjoinder not only acted correctly but would have been warranted in dismissing the libel in its entirety as to all parties including the Tug and its claimant.

Included in the libel as set forth by the government are two separate and distinct transactions. On one hand is the collision which occurred between tug and dredge and on the other is the collision between the SS HARDY and the dike. In only one respect do the collisions have

anything in common. Both dredge and dike have the same owner, the United States. If the Admiralty Extension Act is to be given prospective application the misjoinder which exists should be considered fatal upon exception.

It is held that "a libellant may not be permitted to join in one action altogether, independent and unconnected causes of action." 2 C.J.S. §75, p. 156, n. 49. Also has it been held that a cause of action not maritime cannot be joined with a cause of action maritime. *The St. David* (D.C. Wash.), 209 F. 985. It is obvious that under the navigation statutes as to the dike the cause is in law and non-maritime while as to the dredge the cause is maritime.

Further, with respect to the items of damage the parties are different, Matson and Eckhart doing the damage to the dike and Westport and Tug doing the damage to the dredge. Distinct and separate torts by several persons severally charged cannot be put into the same libel. *Thomas v. Lane* (C.C. Me. 1813), 23 F. Cas. No. 13,902.

If there is a misjoinder it cannot be said that it is not prejudicial to the tug, her claimant and stipulators. The appellant by arresting only the tug and not the SS HARDY seeks to recover all damages and penalties from the tug or its stipulators. It is held that the practice in admiralty is to bring all parties before the Court regardless of the technicalities in pleading," *provided that no party is surprised or prejudiced.*" (Emphasis supplied.) See *Standard Oil Co. v. St. Paul Fire and Marine Ins. Co.* (D.C. N.Y. 1945), 59 Fed. Supp. 470, p. 473. *Benedict on Admiralty*, Sixth Ed., Vol. 2, p. 478:

Whether or not the United States as appellant was owner of the SS HARDY, principles of justice whether in law, equity or admiralty demand the naming of the Hardy as respondent and her arrest in the proceedings. It is clear that the failure to do so when combined with the misjoinder both as to causes and as to parties is extremely prejudicial to the tug, her claimant and stipulators.

CONCLUSION

In conclusion appellees submit that the determination of the case at bar is not to rest upon what rights the appellees may or may not have relied upon at the time of the occurrence, but should and must be decided upon the state of the law which existed at the time of the occurrence with consideration to the substantial rights then available. The decree of the District Court should be affirmed.

Respectfully submitted,

GUNTHER F. KRAUSE,
Proctor for Matson Navigation Company,

ARTHUR S. VOSBURG,
FRANK MCK. BOSCH,
Proctors for W. R. Eckhart,

F. E. WAGNER,
Proctor for Westport Towboat Company
and Tug Louie III,

Appellees.

No. 12903

United States
Court of Appeals
For the Ninth Circuit.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation,

Appellant,

vs.

GEORGE M. MELTON,

Appellee.

Transcript of Record

Appeal from the United States District Court,
for the District of Montana,
Helena Division.

FILED
MAY 21 1951

PAUL H. O'BRIEN,

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

LEONARD A. SCHULZ,

Dillon, Montana.

H. L. MAURY,

Butte, Montana.

A. G. SHONE,

Butte, Montana,

For Plaintiff and Appellee.

WEIR, GOUGH & MATSON,

Helena, Montana,

For Defendant and Appellant.

United States District Court for the District of
Montana, Helena Division

Civil Action No. 459

GEORGE M. MELTON,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,

Defendant.

COMPLAINT

The plaintiff complains of the defendant, and alleges:

1.

Plaintiff is a citizen of the State of Montana, and resides at Dillon therein. The defendant is a corporation, organized and existing under and by virtue of the laws of the State of Minnesota.

The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand (\$3,000) Dollars.

2.

That during all of the times herein mentioned, the defendant owned and operated a certain line of railroad between the village of Kevin, Montana, and the village of Wickes, Montana, and was engaged in the business of carrying and transporting livestock and other freight for hire as a common carrier over and upon its said line of railroad.

3.

That on or about the 30th day of May, 1949,

plaintiff caused to be delivered to defendant at the village of Kevin, Montana, 1,010 ewe sheep, 920 lambs and 74 bucks, all in sound and healthy condition, the property of the plaintiff, for transportation and carriage over defendant's said line of railroad to the said villiage of Wickes, Montana; that the defendant, as such common carrier, duly accepted said sheep from plaintiff for such purpose, and it thereupon became the duty of the defendant to safely and securely transport said sheep from the village of Kevin to the village of Wickes, Montana, and deliver them in good condition to the plaintiff, for the plaintiff had agreed before the delivery of the said sheep to defendant that he would pay the freight charges on them demanded by the defendant, and usually charged by the defendant.

That no agent or servant nor the plaintiff himself accompanied the said shipment, and the said shipment was entirely in the custody and control and management of the defendant from the time it was loaded at Kevin until the time of unloading at Wickes.

4.

That the defendant did not perform its duty in the premises, but on the contrary, and in total disregard of such duty, carelessly and negligently handled and transported said sheep; that by reason of such carelessness and negligence of the defendant, said sheep were bruised, injured, trampled, and suffocated, and that in consequence thereof, 58 of said ewes died; 149 of said lambs died; 170 of said

ewes were rendered sick and feverish, emaciated, reduced in weight, depreciated in market condition and market value, and were dried up and unable longer to nurse their lambs, and their lambs, in the number of 154, were 'bummed,' and rendered motherless, and became emaciated, and normal growth lessened, depreciated in market condition, and market value, so that when sold by plaintiff in October, 1949, they weighed only 7,705 pounds, whereas, but for the negligence of the defendant, they would have weighed 10,850 pounds, and such lambs were of the value of 20c the pound, and such depreciation, due to such negligence of the defendant, was of the value of Six Hundred, Twenty-nine (\$629.00) Dollars loss thereby to plaintiff; that plaintiff was the owner of said sheep, lambs and bucks at all of the time herein mentioned; by reason of such negligence of the defendant, two of plaintiff's bucks in said shipment were killed and rendered of no value, whereas, alive they were of the value of Thirty (\$30) Dollars each, to wit: Sixty (\$60) Dollars; that the said ewes were of the value of Twenty-two (\$22) Dollars per head when delivered to the defendant, and by reason of the said negligence of the defendant, the loss of the said ewes above mentioned was Twelve Hundred, Seventy-six (\$1,276) Dollars; that the said lambs were of the value of Fourteen (\$14) Dollars per head, and by reason of the negligence of the defendant, and the loss of lambs due to such negligence, the plaintiff's net loss on lambs was Two Thousand, Eighty-six (\$2,086) Dollars, and the loss by reason

of the decreased weight of such lambs as survived in the shipment, and due to such negligence, is Six Hundred, Twenty-nine (\$629) Dollars; that the bucks were of the value of Thirty (\$30) Dollars per head, and plaintiff's damage by reason of the loss of the two bucks, due to the negligence of the defendant, was Sixty (\$60) Dollars; that the total of plaintiff's loss and damage due to the said negligent acts of the defendant was and is the sum of Four Thousand, Fifty-one (\$4,051) Dollars, and no part thereof has been paid.

That on or about the 29th day of June, 1949, plaintiff filed his claim in writing with the defendant, wherein and whereby plaintiff demanded that defendant pay the plaintiff his damages so incurred; that the said claim was disallowed and denied by the defendant, and the same is entirely unpaid.

Wherefore, plaintiff prays judgment against the defendant for the sum of Four Thousand, Fifty-one (\$4,051) Dollars, together with interest thereon at the rate of six (6%) per cent per annum from June 29th, 1949, and for his costs of suit herein incurred.

/s/ LEONARD A. SCHULZ,

/s/ H. L. MAURY,

/s/ A. G. SHONE,

Attorneys for Plaintiff.

/s/ H. L. MAURY,

Attorney for Plaintiff.

[Endorsed]: Filed January 17, 1950.

[Title of District Court and Cause.]

SUMMONS

To the above-named Defendant: Great Northern Railway Company, a corporation.

You are hereby summoned and required to serve upon Messrs. Leonard A. Schulz, H. L. Maury and A. G. Shone, plaintiff's attorneys, whose address is 33 Hirbour Building, Butte, Montana, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

H. H. WALKER,
Clerk of Court.

[Seal] By /s/ HELEN HARSTEAD,
Deputy Clerk.

Dated: January 17, 1950.

Return on Service of Writ attached.

[Endorsed]: Filed January 20, 1950.

[Title of District Court and Cause.]

MOTION TO MAKE MORE DEFINITE,
AND DEMAND FOR JURY TRIAL

Defendant moves the court for an order directing the plaintiff to file a more definite statement of the following allegations in Lines 12 to 15, Paragraph 4, Page 2, of his complaint filed herein to wit:

“That the defendant did not perform its duty in the premises, but on the contrary, and in total disregard of such duty, carelessly and negligently handled and transported said sheep.”

1. Said allegations are vague, general and indefinite and do not apprise the defendant in what manner it carelessly and negligently handled the sheep, and at what point on the route from Kevin to Wickes, Montana, such careless and negligent acts were committed.

2. Said allegations are too vague, general and indefinite to apprise the defendant of the facts the plaintiff will submit as constituting careless and negligent handling and transportation, and where such acts were committed.

3. Said allegations are but conclusions of the plaintiff and do not set out any facts which would amount to or might amount to careless and negligent acts on the part of the defendant during the handling and transportation of said sheep.

Defendant desires a more detailed statement setting forth in what manner it carelessly and negli-

gently handled and transported the sheep mentioned in said complaint, and at what point on the route from Kevin to Wickes, Montana, and the facts the plaintiff will submit as constituting careless and negligent handling and transportation of said sheep. The ground of the motion is that the above matters are not averred with sufficient definiteness or particularity to enable defendant properly to prepare its responsive pleading.

Said named defendant demands a trial by jury in this cause.

Dated February 1st, 1950.

WEIR, GOUGH & MATSON,
/s/ E. K. MATSON,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 1, 1950.

[Title of District Court and Cause.]

ORDER

No. 459, George M. Melton vs, Great Northern Railway Company.

This cause was duly called for hearing this day on motion to make more definite statement, Mr. Leonard A. Schulz and Mr. H. L. Maury being present and appearing for the plaintiff, and Mr. Enor

K. Matson being present and appearing for the defendant.

Thereupon said motion was duly argued by counsel and submitted, whereupon, after due consideration, Court ordered that said motion be and is denied and defendant granted twenty days to further plead. Thereupon the cause was ordered set for trial on September 27, 1950, at 10:00 a.m.

Thereupon, on motion of Mr. Maury, Court ordered that the complaint herein be amended by interlineation, by the Clerk, as follows: at the end of paragraph three insert "That no agent or servant nor the plaintiff himself accompanied the said shipment, and the said shipment was entirely in the custody and control and management of the defendant from the time it was loaded at Kevin until the time of unloading at Wickes."

Entered in open court at Helena, Montana, September 6, 1950.

H. H. WALKER,
Clerk.

[Title of District Court and Cause.]

ANSWER

Defendant Great Northern Railway Company, by its attorneys, Weir, Gough & Matson, for its answer to the complaint herein:

1. Alleges that the complaint fails to state a claim against this defendant upon which relief can be granted.

2. Admits the allegations of Paragraphs 1 and 2.

3. Admits the allegations of Paragraph 3 as amended, except denies that said sheep were in a sound and healthy condition, and alleges that one old sheep was ruptured, and one old sheep had been injured and was limping when they were loaded into the loading chute and railroad cars at Kevin, Montana, and alleges that said sheep were wet when loaded by plaintiff and in the condition hereinafter stated, and alleges that its duty to deliver said sheep in good condition to plaintiff was subject to the risk of injury and damage to the same assumed by the plaintiff as the proximate result of plaintiff's loading said sheep when wet, plaintiff's failure to properly mother the lambs, and plaintiff's properly loading said sheep into defendant's cars, and as the proximate result of general rain storms encountered by the sheep over the route of the shipment, all as hereinafter set forth.

4. Admits plaintiff was the owner of said sheep, lambs and bucks at all of the time mentioned in said complaint; admits that no part of the sum of \$4,051.00 has been paid to plaintiff, and admits the allegations of the last paragraph of Paragraph 4 beginning with the words "that on or about the 29th day of June," and ending with the words "entirely unpaid," but denies the allegations of the first paragraph of said Paragraph 4 that the defendant did not perform its duty in the premises,

that the defendant, in total disregard of such duty carelessly or negligently handled and transported said sheep, that by reason of such carelessness and negligence of the defendant said sheep were bruised, injured, trampled, suffocated, or in anywise injured or damaged, and denies that in consequence of carelessness or negligence of the defendant 58, or any other number, of said ewes died; that 149, or any other number, of said lambs died; that 170, or any other number, of said ewes were rendered sick, feverish, emaciated, reduced in weight, depreciated in market condition or market value, or were dried up or unable to nurse their lambs, and that their lambs, in the number of 154, or in any other number, were bummed, rendered motherless, became emaciated, their normal growth lessened, depreciated in market condition or market value; and denies that by reason of negligence of the defendant two, or any other number, of plaintiff's bucks in said shipment were killed or rendered of no value; and denies that by reason of negligence of defendant the loss of said ewes was \$1276.00, or any other sum; denies that by reason of negligence of the defendants the loss of lambs was \$2086.00, or any other sum; denies that because of negligence of the defendant the loss by reason of decreased weight of said lambs was \$629.00, or any other sum; denies that because of any act or omission of the defendant, plaintiff was damaged by reason of the loss of the two bucks in the sum of \$60.00, or any other sum; and denies that by reason of any act or omission of defendant, the

plaintiff has suffered loss or damage in the sum of \$4051.00, or in any other sum; and alleges that it has no information or belief as to any of the other allegations or figures as set forth in the said first paragraph of said Paragraph 4, and therefore denies in whole and in part each of said allegations therein.

5. Defendant is advised and believes and therefore alleges that the cost of said sheep to plaintiff at Kevin, Montana, at or about the time of said shipment did not exceed \$28.00 the pair, to wit, \$28.00 for each pair consisting in one aged sheep and one lamb, and that they were of no greater value; and that the cost of transporting said sheep from Kevin, Montana, to Wickes, Montana, was approximately the sum of sixty cents (60c) per head.

And for a further separate and affirmative defense to said complaint, defendant alleges:

1. That said sheep were consigned to said plaintiff under the Uniform Live Stock Contract, signed in duplicate by plaintiff and plaintiff's agent, Jack Thomas, copies of which contracts are attached hereto, marked Exhibits "1" and "2," and by this reference made a part hereof; that said contract, among other things, specifically provided as follows:

"Sec. 1. (a) Except in the case of its negligence proximately contributing thereto, no carrier or party in possession of all or any of the live stock herein described shall be liable

for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, the inherent vice, weakness, or natural propensity of the animal, or the act or default of the shipper or owner, or the agent of either, or by riots, strikes, stoppage of labor or threatened violence.

“(b) Unless caused by the negligence of the carrier or its employees, no carrier shall be liable for or on account of any injury or death sustained by said live stock occasioned by any of the following causes: Overloading, crowding one upon another, escaping from cars, pens, or vessels, kicking or goring or otherwise injuring themselves or each other, suffocation, fright, or fire caused by the shipper or the shipper's agent, heat or cold, changes in weather or delay caused by stress of weather or damage to or obstruction of track or other causes beyond the carrier's control.

“Sec. 4 (a) The shipper at his own risk and expense shall load and unload the live stock into and out of cars, except in those instances where this duty is made obligatory upon the carrier by statute or is assumed by a lawful tariff provision. * * *”

2. That all of said sheep had been driven through rain for eight (8) miles and had been exposed to the rain most of the day were loaded and shipped from Kevin, Montana, all of which plain-

tiff well knew; that because of their exposure to the rain and becoming wet, the lambs and their mothers lost the scent of each other, and the lambs were not properly mothered when loaded by the plaintiff and his agents on the railroad cars; that plaintiff nevertheless insisted on loading the sheep on defendant's cars in said wet condition, without properly sorting and mothering, and as a result many lambs were separated from their mothers and were not placed in the same car with their mothers, as plaintiff well knew.

3. That some cars were overloaded, which fact was called to the attention of plaintiff by defendant's Agent at Kevin; that plaintiff insisted nevertheless that there was plenty of room in the car or cars and that they were not overloaded and insisted on closing the doors thereto, despite the protest of defendant's Agent; that plaintiff was personally present at all times during the loading of said sheep and directed the same, and knew the condition of the sheep at the time they were loaded, knew the separation of the lambs from their mothers, and directed the manner in which they were loaded in the railroad cars; that the said plaintiff loaded the said sheep in said condition in said cars at his own risk.

4. That while said sheep were being transported between Kevin and Wickes, Montana, the said cars encountered a general rain storm over the whole route of their transportation from Kevin to Wickes, and that at the time of loading said sheep for

transportation plaintiff knew, or in the exercise of ordinary care for said sheep should have known, that said sheep would encounter said general rain storm over the route of their transportation, and plaintiff knew the possible effect of the rain upon said shipment as hereinafter set forth, and which are the ordinary risks of the shipper in loading livestock and delivering the same to the carrier for transportation, and assumed by him.

5. That said sheep were loaded in properly sanded livestock cars for the transportation of sheep, being cars of the standard and usual type for transportation of sheep by rail, and bedded in the standard and usual manner for sheep; that the said rain was blown into said cars and onto the said sheep, which were already wet when they were loaded; that as a result, the said sheep, the manure from the same, the sand with which the cars were bedded, became saturated with water and caused said sand and manure from said sheep to become mixed, viscous, adhesive, sticky and slippery, and caused the bedding in said cars to be mixed with the said manure and to become wet and slippery; that as a result and in the ordinary and careful movement of said cars over the railroad of defendant the said sheep slipped and fell, became covered with the mixture of sand and manure, became frightened, trampled upon each other, and piled up in the cars, all without any fault, negligence or carelessness on the part of the defendant; that all injury and damage, if any, to said sheep was the

direct and proximate result of the wet condition of said sheep when they were loaded by plaintiff, the over-crowded condition of same in the cars as loaded by plaintiff, and of said rain storm, as hereinbefore set forth; that the injury and damage to said sheep, if any, were proximately caused by the wilful, careless and negligent acts of the plaintiff in loading said sheep, as hereinbefore stated, and were the result of accident caused directly and proximately by an act of God in the manner herein stated.

6. Denies each and every allegation of said complaint not herein specifically admitted, qualified or denied.

Wherefore, defendant Great Northern Railway Company demands and prays that the complaint be dismissed with costs to said defendant.

WEIR, GOUGH & MATSON,
Attorneys for Defendant Great Northern Railway
Company, a Corporation.

/s/ T. B. WEIR,
Of Counsel, Attorney for Great Northern Railway
Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 2, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial before the Court, sitting without a jury, on the 27th day of September, 1950; the plaintiff was present in court and represented by his counsel Leonard Schulz, Esq., and H. L. Maury, Esq., and the defendant was represented by its counsel, T. B. Weir, Esq., and Newell Gough, Esq.; thereupon oral and documentary evidence was introduced by and on behalf of each of the parties, and at the close of all of the evidence the parties rested and thereafter, within the time granted by the Court, each of the parties filed their briefs and proposed Findings of Fact and Conclusions of Law, and the cause was then submitted to the Court for its consideration and decision, and the Court having considered all of the evidence and testimony submitted at the trial of the cause and the briefs of counsel, and being fully advised in the premises, now makes and orders filed its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

I.

That plaintiff George M. Melton was, at all times mentioned, and still is, a citizen of the State of Montana, residing at Dillon, Montana; that defendant Great Northern Railway Company, a cor-

poration, is a railroad corporation, organized and existing under and by virtue of the laws of the State of Minnesota, and at all times mentioned was and still is a citizen of the State of Minnesota; that the amount in controversy exceeds the sum of \$3,000.00, exclusive of interest and costs.

II.

That on May 30, 1949, defendant owned and operated and was authorized to operate a certain line of railroad between Kevin, Montana, and Wickes, Montana, that such line from Kevin to Wickes was entirely within the boundaries of the State of Montana; that during all of the months of May and June, 1949, defendant was engaged in the business of carrying and transporting persons, livestock and other freight for hire as a common carrier over and upon said line of railroad.

III.

That on May 30, 1949, plaintiff delivered to defendant, and loaded on defendant's railroad cars at Kevin, Montana, 1010 ewe sheep, 920 lambs and 74 bucks, all in sound and healthy condition and all the property of the plaintiff; that defendant agreed to transport and carry, and did transport and carry, over said line for \$600.00 freight said livestock to Wickes, Montana; that such sum was paid by plaintiff to defendant; that neither plaintiff nor plaintiff's agents accompanied said shipment, nor was control of said shipment retained by plaintiff or his agents during the shipment and

transportation of said sheep from Kevin, Montana, to Wickes, Montana.

IV.

That plaintiff and defendant entered into a written contract for the transportation of said shipment of sheep from Kevin, Montana, to Wickes, Montana, that such contract was designated as a Uniform Livestock Contract; that said contract contained certain provisions which were printed after the plaintiff's signature and extended onto the back of the contract; that said provisions purportedly constituted a special contract and were designed to limit the liability imposed by Section 8-812, R.C.M. 1947 on inland carriers of freight for hire; that among the provisions thereof were the following:

“Sec. 1(a). Except in the case of its negligence proximately contributing thereto, no carrier or party in possession of all or any of the livestock herein described shall be liable for any loss thereof or damage thereto or delay caused by the Act of God, the public enemy, quarantine, the authority of law, the inherent vice, weakness, or natural propensity of the animal, or the act or default of the shipper or owner, or the agent of either, or by riots, strikes, stoppage of labor or threatened violence.

“(b) Unless caused by the negligence of the carrier or its employees, no carrier shall be liable for or on account of any injury or death

sustained by said livestock occasioned by any of the following causes: Overloading, crowding one upon another, escaping from cars, pens or vessels, kicking or goring or otherwise injuring themselves or each other, suffocation, fright, or fire caused by the shipper or the shipper's agent, heat or cold, changes in weather or delay caused by stress of weather or damage to or obstruction of track or other causes beyond the carrier's control.

"Sec. 4(a). The shipper at his own risk and expense shall load and unload the livestock into and out of cars, except in those instances where this duty is made obligatory upon the carrier by statute or is assumed by a lawful tariff provision. * * *"

That said \$600.00 freight paid by plaintiff to defendant for said shipment of sheep from Kevin to Wickes, Montana, was the ordinary and usual rate for such a shipment and that there was no consideration for the special contract limiting the defendant's statutory liability, provisions of which contract appear after the plaintiff's signature; that said contract does not purport to relieve defendant from liability for loss occasioned by the negligence of defendant or its employees.

V.

That prior to the loading of said sheep at Kevin, Montana, on May 30, 1949, they had been subjected to rain which caused them to become wet; that they had been driven through mud to the loading

pens; that it rained immediately prior to the loading of said sheep at Kevin, Montana; that plaintiff judged the said sheep had dried sufficiently that they could be safely loaded and transported to Wickes, Montana; that defendant accepted said sheep for carriage over its line as being in apparent good shape and fit to travel over said line to Wickes, Montana; that defendant knew said shipment of sheep had been rained upon and were wet when it accepted them; that defendant had weather information available to it and knew, or could have known in the exercise of reasonable care, that more rain and wet conditions were to be expected; that after loading said sheep at Kevin, Montana, and during the course of transportation to Wickes, Montana, said shipment of sheep were again rained upon and as a result thereof became wet and saturated with moisture; that the cars in which they were being so transported also became wet and muddy, causing the said sheep to become covered with dirt, manure and other foreign matter; that as a proximate result of being rained on and becoming covered with dirt and other foreign matter, and being transported in a car, the floor of which was wet and slippery, said sheep became bruised, injured, trampled, suffocated and said sheep lost the scent of each other, resulting in ewes and lambs being unable to identify their own, and as a direct result 58 of said ewes died, 149 of said lambs died, 170 of said ewes were rendered sick and two of said bucks were killed; that because of the slippery condition of the floors of said railroad cars

upon arrival at Wickes, Montana, said sheep were all jammed up in the north end of each and every railroad car.

VI.

It is further found that defendant was negligent in accepting for carriage, and in transporting to Wickes, Montana, the said shipment of sheep when it knew, or in the exercise of reasonable care should have known, that it might rain on said sheep during the course of transportation to Wickes, Montana, and that damage to said sheep as a result of such additional rain would occur; that defendant was negligent in not properly caring for said sheep or properly inspecting said sheep to determine their condition after they were rained upon during the course of transportation from Kevin, Montana, to Wickes, Montana.

VII.

That the damage to the sheep did not occur as a result of any inherent defect, vice, weakness or spontaneous action of the property itself, or of the act by public enemy of the United States or of this state, nor was the damage caused as a result of any act of the law or any irresistible superhuman cause; that said damage of said sheep was directly and proximately caused by defendant's negligent acts and omissions as aforesaid; that such negligent acts and omissions were the proximate cause of plaintiff's loss.

VIII.

That at the time of delivery and loading of said freight, said livestock was in good condition and

was of the reasonable value of \$28,136.00; that when said property was delivered at Wickes, Montana, by defendant to plaintiff, the said livestock had no greater value than \$20,000.00 by reason of the negligent manner in which the defendant transported the same; that plaintiff exercised all reasonable care continuously until the middle of September, 1949, in which to repair his loss by nursing and caring for the remainder of said band of sheep and reduced his loss to \$4051.00, which sum is the damage plaintiff has directly sustained by reason of defendant's negligence aforesaid.

From the foregoing Findings of Fact the Court draws the following:

Conclusions of Law

I.

That this Court has jurisdiction hereof.

II.

The special contract between defendant and plaintiff, purporting to relieve defendant of its statutory liability, is invalid and not binding upon plaintiff for the reason that there is no consideration for such a special contract, and the defendant is liable for the damages aforesaid under the provisions of Section 8-812, R.C.M. 1947; the defendant is further liable for the loss suffered by the plaintiff for the reason that the defendant's negligent acts and omissions proximately caused the plaintiff's loss.

III.

The Court concludes further that plaintiff is entitled to judgment against the defendant in the sum of Four Thousand Fifty-one and no/100ths (\$4051.00) Dollars, together with interest thereon at 6% per annum from June 29, 1949, until paid, and for his costs of suit herein incurred.

Let judgment be entered accordingly.

Done and dated this 24th day of January, 1951.

/s/ W. D. MURRAY,

United States District Judge.

[Endorsed]: Filed January 24, 1951.

United States District Court for the District of
Montana, Helena Division

No. 459

GEORGE M. MELTON,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,

Defendant.

JUDGMENT

Be It Remembered that this cause came on regularly for trial before the Court, sitting without a jury, on the 27th day of September, 1950. Plaintiff was present in court and represented by counsel,

Leonard Schulz, Esq., and H. L. Maury, Esq., and the defendant was represented by its counsel, T. B. Weir, Esq., and Newell Gough, Esq.; witnesses were sworn and testified in behalf of the parties; the cause was submitted to the Court on briefs thereafter filed by the respective parties. On January 24, 1951, the Court makes its Findings, wherein and whereby the Court finds the issues in favor of the plaintiff and against the defendant, and assessed plaintiff's damages in the sum of Four Thousand, Fifty-one (\$4,051) Dollars, with interest from June 29, 1949, at six (6%) per cent, and for his costs.

Wherefore, It Is Ordered, Adjudged and Decreed that the plaintiff, George M. Melton, have and recover of and from the defendant, Great Northern Railway Company, a corporation, Four Thousand, Fifty-one (\$4,051) Dollars, principal, and Three Hundred Eighty-two and 14/100 (\$382.14) Dollars interest, making a total sum of Four Thousand Four Hundred Thirty-three and 14/100 (\$4,433.14) Dollars, together with costs taxed at \$64.72.

/s/ W. D. MURRAY,

United States District Judge.

Entered and Noted in Civil Docket: Jan. 30, 1951.

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do

hereby Certify that the foregoing papers hereto annexed constitute the Judgment Roll in the above-entitled action.

Witness my hand and seal of said Court this 30th day of January, 1951.

[Seal] /s/ H. H. WALKER,
Clerk.

By /s/ SUSAN L. ROSSMAN,
Deputy.

[Endorsed]: Filed January 29, 1951.

[Title of District Court and Cause.]

DEFENDANT'S REQUEST FOR FINDINGS
OF FACT AND CONCLUSIONS OF LAW

Comes now defendant in the above-entitled action and requests the court to make findings of fact and conclusions of law in said cause as follows:

Findings of Fact

1. That plaintiff is a citizen of the State of Montana, residing at Dillon, Montana; that defendant is a railway corporation organized and existing under and by virtue of the laws of the State of Minnesota, authorized to operate and operating a common carrier line of railroad between Kevin, Montana, and Wickes, Montana, for the carriage of persons, livestock and other freight for hire.

2. That on May 30, 1949, plaintiff delivered to defendant at Kevin, Montana, for transportation by defendant and delivery to plaintiff at Wickes, Montana, 1010 unshorn ewe sheep, 920 unshorn lambs and 74 unshorn bucks; that thereafter said sheep were transported by defendant and delivered to plaintiff at said Wickes, Montana, on May 31, 1949.

3. That plaintiff in his complaint claims damages to said shipment of sheep in the total sum of \$4,051.00.

4. That the transportation of said shipment of sheep by plaintiff from Kevin, Montana, to Wickes, Montana, was subject to the provisions of the Uniform Livestock Contracts entered into between plaintiff and defendant prior to the commencement of the transportation of said sheep; that said Uniform Livestock Contracts were duly signed by the parties to this action or on their behalf by their duly authorized agent, and were in full force and effect at the time of the shipment of said sheep and during the course of the transportation thereof.

5. That the said Uniform Livestock Contracts contained, among other provisions thereof, the following:

“Sec. 1(a). Except in the case of its negligence proximately contributing thereto, no carrier or party in possession of all or any of the livestock herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy,

quarantine, the authority of law, the inherent vice, weakness, or natural propensity of the animal, or the act or default of the shipper or owner, or the agent of either, or by riots, strikes, stoppage of labor or threatened violence.

“(b) Unless caused by the negligence of the carrier or its employees, no carrier shall be liable for or on account of any injury or death sustained by said livestock occasioned by any of the following causes: Overloading, crowding one upon another, escaping from cars, pens or vessels, kicking or goring or otherwise injuring themselves or each other, suffocation, fright, or fire caused by the shipper or the shipper's agent, heat or cold, changes in weather or delay caused by stress of weather or damage to or obstruction of track or other causes beyond the carrier's control.

“Sec. 4(a). The shipper at his own risk and expense shall load and unload the livestock into and out of cars, except in those instances where this duty is made obligatory upon the carrier by statute or is assumed by a lawful tariff provision. * * *”

6. That before loading said sheep at Kevin, Montana, on May 30, 1949, said sheep had been subjected to rain which caused them to become wet; that after loading said sheep at said Kevin, Montana, and during the course of transportation to the said Wickes, Montana, said shipment of sheep were

again rained upon, and as a result thereof became wet and saturated with moisture, and the cars in which they were being so transported also became wet and muddy, causing the said sheep to become covered with dirt and other foreign matter.

7. That it is inherent in the nature of sheep when wet and muddy to lose their scent of each other, resulting in ewes and lambs being unable to identify each other.

8. That plaintiff was in sole charge of and responsible for the loading of the said sheep at Kevin, Montana, and was liable for any risk incident to loading said sheep in the condition then and there existing or in the manner or method of loading.

9. That no evidence of negligence on the part of the defendant was proven by plaintiff, either as charged in his complaint or otherwise.

10. That the damage suffered by plaintiff to his said shipment of sheep was a result of the inherent vice, weakness and natural propensity of the sheep themselves, the change of weather to which said shipment of sheep were subjected, and the climatic conditions of heat and cold existing during the course of the transportation, and was a risk assumed by plaintiff, for which defendant was not liable or responsible, being relieved of liability therefor by reason of the provisions of the Uniform Livestock Contracts governing said shipment of sheep.

Conclusions of Law

1. Defendant was not negligent as charged in plaintiff's complaint, or otherwise.

2. Plaintiff is bound by the terms of the Uniform Livestock Contracts entered into between plaintiff and defendant.

3. Plaintiff's damage was the result of the inherent vice, weakness and natural propensity of the sheep themselves, the change of weather to which said shipment of sheep was subjected, and the climatic conditions of heat and cold existing during the course of the transportation, and was a risk assumed by plaintiff.

4. That plaintiff is not entitled to recover from defendant in any sum, and that judgment be entered accordingly.

Dated this day of, 1950.

.....,

Judge.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT
COURT OF APPEALS

Notice Is Hereby Given that Great Northern Railway Company, a corporation, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judg-

ment entered in this action on January 30th, 1951.

Dated this 5th day of February, 1951.

T. B. WEIR,

NEWELL GOUGH, JR.,

E. K. MATSON,

By /s/ T. B. WEIR,
Attorneys for Great Northern Railway Company,
a Corporation.

[Endorsed]: Filed February 5, 1951.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men by These Presents: That we, Great Northern Railway Company, a corporation, as Principal, defendant in the above-entitled action, and Seaboard Surety Company, a corporation, as Surety, are held and firmly bound unto George M. Melton, plaintiff in the above-entitled action, in the penal sum of Six Thousand and no/100 Dollars (\$6,000.00) lawful money of the United States of America, for the payment of which well and truly to be made, we and each of us bind ourselves, our successors and assigns jointly and severally by these presents.

The condition of this obligation is such that whereas said George M. Melton did, on the 30th day of January, 1951, obtain a Judgment in the

United States District Court for the District of Montana, Helena Division, in the above-entitled action therein pending against said Great Northern Railway Company for the sum of Four Thousand Four Hundred Thirty-three and 14/100 Dollars (\$4,433.14), and costs and disbursements of suit, and to reverse said Judgment said Great Northern Railway Company has taken an appeal from said Judgment of said District Court to the United States Court of Appeals for the Ninth Circuit and is entitled to it, and desires to obtain a stay of execution on said Judgment pending said appeal, by filing with said District Court of a good and sufficient supersedeas bond condition as required by law, with surety to be approved by said Court.

Now, Therefore, the condition of this obligation is such that if said Great Northern Railway Company shall satisfy said Judgment in full, together with all costs, interest and damages, if for any reason said appeal is dismissed, or if said judgment is affirmed, and also shall satisfy in full such modification of said Judgment and such costs, interest and damages as said appellate court may adjudge and award, the above obligation shall be null and void, otherwise to remain in full force and effect, and in such event Judgment may be entered in said District Court against the surety hereon in favor of George M. Melton, as in such cases made and provided by law.

In Witness Whereof, said Great Northern Railway Company, a corporation, Principal, has caused

this bond to be signed by its duly authorized attorney thereof, and said Seaboard Surety Company, a corporation, Surety, has caused this bond to be signed by its duly authorized officers or agents and its corporate seal to be affixed thereto.

GREAT NORTHERN RAIL-
WAY COMPANY,
A Corporation.

By /s/ T. B. WEIR,
Its Attorney for Montana.

SEABOARD SURETY
COMPANY,
A Corporation.

[Seal] By /s/ E. B. COGSWELL,
Its Attorney-in-Fact.

COGSWELL AGENCY,
/s/ E. B. COGSWELL,
Resident Agent.

Approved:

/s/ W. D. MURRAY,
Judge, United States District Court for the District
of Montana, Helena Division.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 9, 1951.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
DOCKET AND DOCKETING APPEAL

For Satisfactory Reasons appearing to the Court, the time for filing the record on appeal and docketing the appeal in this case in the United States Court of Appeals for the Ninth Circuit, pursuant to the appeal sued out, is extended to and including the 16th day of April, 1951.

Dated this 27th day of February, 1951.

/s/ W. D. MURRAY,
Judge, United States District Court for the District
of Montana, Helena Division.

[Endorsed]: Filed and entered February 28,
1951.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

Defendant hereby designates for inclusion the complete record and all the proceedings in this action for use on its appeal to the United States Court of Appeals for the Ninth Circuit, including:

1. Complaint;
2. Defendant's answer, including Exhibits Nos. 1 and 2 attached to the Complaint;

3. Defendant's Motion to Make More Definite and the Order of the Court denying said motion;

4. Defendant's Request for Findings of Fact and Conclusions of Law;

5. Findings of Fact and Conclusions of Law;

6. Judgment;

7. Notice of Appeal with date of filing;

8. Entry in Civil Docket as to names of parties to whom Clerk mailed copy of Notice of Appeal;

9. Supersedeas Bond with date of filing and proof of service upon attorneys for plaintiff;

10. Complete transcript of the testimony and of the trial proceedings;

11. Exhibits received and admitted in evidence, which are:

(a) Plaintiff's Exhibits Nos. 1, 2 and 3;

(b) Defendant's Exhibits Nos. 5, 8, 9, 10, 11, 12, 13 and 14; part of Exhibit No. 6, being dispatcher's record of movement of trains, Butte Division, Great Northern Railway Company, dated Great Falls, Montana, Monday, May 30, 1949, and part of Exhibit No. 7, being dispatcher's record of movement of trains, Butte Division, Great Northern Railway Company, dated Great Falls, Montana, Tuesday, May 31, 1949;

12. Order Extending Time for Filing Docket (Record) and Docketing Appeal.

Dated March 6th, 1951.

/s/ T. B. WEIR,

/s/ NEWELL GOUGH, JR.,

/s/ E. K. MATSON,

Attorneys for Defendant and Appellant, Helena,
Montana.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 6, 1951.

[Title of District Court and Cause.]

ORDER FOR TRANSMISSION OF ORIGINAL PAPERS

Upon application of the above-named defendant, and it appearing that the rules of the United States Court of Appeals for the Ninth Circuit so provide, It Is Hereby Ordered that the Clerk of the Court transmit to the United States Court of Appeals for the Ninth Circuit, all the original papers in the above-entitled action, including all exhibits and the transcript of the testimony on file with the Clerk, with his Certificate identifying the same with reasonable definiteness.

Dated this 6th day of April, 1951.

/s/ W. D. MURRAY,

Judge, United States District Court for the District
of Montana, Helena Division.

[Endorsed]: Filed April 6, 1951.

Entered April 7, 1951.

In the United States District Court, District of
Montana, Helena Division

No. 459

GEORGE M. MELTON,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,

Defendant.

REPORTER'S TRANSCRIPT

Tried before the Honorable W. D. Murray, U. S. District Judge for the District of Montana, sitting without a jury, at Helena, Montana, on September 27, 1950.

H. L. MAURY,

A. G. SHONE, and

LEONARD A. SCHULZ,

Attorneys for Plaintiff.

WEIR, GOUGH & MATSON,

Attorneys for Defendant.

Be It Remembered, that the above cause came on regularly for trial before the Hon. W. D. Murray, U. S. District Judge for the District of Montana, sitting without a jury at Helena, Montana, on the 27th day of September, 1950. The plaintiff was present in person and represented by his counsel, Messrs. H. L. Maury and Leonard A. Schulz, and

the defendant was represented by its counsel, Mr. Newall Gough, Jr.

Whereupon, the following proceedings were had:

The Court: Number 459, Melton vs. Great Northern Railway Company.

Mr. Maury: Plaintiff is ready.

Mr. Gough: Defendant is ready.

Mr. Maury: I take it, your Honor, you have read the pleadings, and no opening statement is necessary.

The Court: Yes.

Mr. Maury: Mr. Melton.

GEORGE M. MELTON

plaintiff, called as a witness on his own behalf, being first duly sworn, testified as follows:

Direct Examination

By Mr. Maury:

Q. State your name for the Court.

A. George M. Melton.

Q. Are you a citizen of Montana?

A. Yes, sir.

Q. Where were you born?

A. I was born in Dillon, Montana.

Q. Beaverhead County?

A. Beaverhead County.

Q. And you have lived there since?

A. All my life, yes, sir.

Q. What occupation do you follow, Mr. Melton?

A. I am in the sheep business.

(Testimony of George M. Melton.)

Q. By the sheep business, I will ask you to explain further. Do you buy and sell sheep?

A. Yes, sir; I am what is known as an order buyer. I take orders for sheep, buy them, and ship them to all parts of the Western United States, and sometimes in the East.

Q. Have you also had experience raising sheep?

A. Yes; in addition to that, I have been in the sheep raising business with my sons. [2*]

Q. How long?

A. Well, off and on, 35 years.

Q. Have you kept informed as to the market prices of sheep? A. Yes, sir.

Q. Mr. Melton, on the 30th of May, 1949, where were you? A. I was at Kevin, Montana.

Q. What were you doing there that day?

A. I was buying and loading a band of ewes and lambs.

Q. On what railroad?

A. The Great Northern Railway.

Q. How many lambs and ewes and bucks did you load that day on the Great Northern Railway train?

A. 1016 ewes, 926 lambs, and 74 bucks.

Mr. Gough: Pardon me, Mr. Maury, I didn't hear the number of lambs.

A. 925.

Q. Speak louder. Mr. Gough must hear and the Court must hear. Have you a memorandum of

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of George M. Melton.)

the transactions of that day that you know to be correct? A. Yes, sir.

Q. Where were these lambs and ewes and bucks to be shipped to?

A. To Wickes, Montana, where I and my son have a ranch.

Q. Tell the Court if the railroad from Kevin to Wickes is entirely in Montana. [3]

A. It is.

Q. I mean the Great Northern Railway?

A. The Great Northern.

Q. What time of day did you get your sheep loaded? I am speaking of all the sheep.

A. Well, we started to load about 10:30 in the morning, as I remember it, and we were through loading about two in the afternoon.

Q. What kind of day was it?

A. Well, it had rained the night before when we were moving these sheep in to load, and we were careful to watch the weather to see it didn't storm any more. We held out awhile to see if it was going to storm, and it finally cleared up, and the wind was blowing, and the animal heat of these ewes and the wind dried them up sufficiently. We looked at them and inspected them, and decided if it didn't storm any more, we could load and ship in good shape, and we ordered them into the yard.

Q. Do you remember the name of the agent of the Great Northern at Kevin? A. I do not.

Q. Is he here in Court, or do you know?

(Testimony of George M. Melton.)

A. I don't know whether I would recognize him or not.

Q. Did you get bills of lading for the sheep?

A. Yes. They were billed on two bills of lading for the [4] reason that being ewes and lambs, they were brought in in two pens, outside of the bucks, so we billed them that way so in case they were fed in transit, the different numbers would be kept by themselves.

Q. Are these the bills of lading you got from the railroad at that point (handing instruments to witness)?

A. They are.

Q. I see that one is signed "George M. Melton," and one is signed "Jack Thomas"?

A. Yes, sir.

Q. Did you in fact own both?

A. I owned the sheep. We signed two different names so in case they had to feed them in Great Falls or Helena in transit, these bunches would be kept separate.

Q. You owned all the sheep?

A. Yes, I owned all the sheep.

Mr. Maury: I take it you are familiar with these?

Mr. Gough: I think so. I wonder if I could ask a question on one of them?

The Court: I think you had better have them marked for identification.

Mr. Maury: We offer in evidence Exhibits 1 and 2 for the plaintiff.

(Testimony of George M. Melton.)

Mr. Gough: May I get—I want to get which one is which here. [5]

Mr. Maury: One is signed “Jack Thomas,” the other is signed “George M. Melton.”

Mr. Gough: Could I inquire for a minute?

Mr. Maury: Yes.

Mr. Gough: Mr. Melton, referring to Exhibit 1, which is livestock contract covering five cars of sheep from Kevin to Wickes, Montana, signed by Jack Thomas, you will notice, I believe, that shows 598 head of ordinary sheep. That is incorrect, or is it, do you know, that total number of sheep?

A. I wouldn't know if that is exactly correct. I think at that time we gave the agent these numbers up here, which would show. I think that is substantially correct.

Mr. Gough: Opposite the numbers of the cars in the bill of lading are shown the deck loadings of each car, are they not?

A. Yes.

Mr. Gough: So the total deck loadings would be the correct number, isn't that correct?

A. I think that is the way we gave it to the agent, and I presume it would be correct.

Mr. Gough: So, if there were any discrepancy between the total shown here, and the total when you add the deck loadings, it would be the total of the decks that would be correct?

A. I am not sure; I don't know what that total would be.

(Testimony of George M. Melton.)

Mr. Gough: I think actually this total would be 665 [6] rather than 598. I am just merely straightening it out for the record.

Mr. Maury: Mr. Schulz informs me your statement is correct.

Mr. Gough: No objection.

The Court: Mr. Gough?

Mr. Gough: Yes, sir.

The Court: What figures?

Mr. Gough: On Exhibit 1, which would be the bill of lading signed by Jack Thomas, on the right hand column, opposite the car numbers, are listed two columns of numbers. Those are the deck loading numbers.

The Court: For instance, 70-67?

Mr. Gough: Yes. The total of those deck numbers is actually 665 rather than the 598 shown as billed.

The Court: Which column do you add there?

Mr. Gough: You would add both columns.

The Court: 70 and 67?

Mr. Gough: You have to add all these numbers to get the total. Those are decks, first and second. We have no objection.

The Court: Very well, admitted.

(Plaintiff's Exhibit 1, being Uniform Livestock Contract dated May 30, 1949, between Great Northern Railway Company and Jack Thomas; and Plaintiff's Exhibit 2, being Uniform Livestock Contract dated May 30, 1949,

(Testimony of George M. Melton.)

between Great Northern Railway Company and George M. Melton, were here received in evidence, and will be certified to the [7] Court of Appeals by the Clerk of the above Court.)

Mr. Maury: I want to call to your Honor's attention on the exhibits, and above the signature of George M. Melton and above the signature of Jack Thomas, the paragraph entitled "Now, Therefore, Witnesseth," and the words "Livestock described below in apparent good order."

Q. (By Mr. Maury): Mr. Melton, did you, or any servant or agent of yours, accompany those sheep on the route?

A. No, sir, we rode in a car.

Q. How far, approximately, is it from Kevin to Wickes? A. I think about 250 miles.

Q. Did you meet the sheep the next day?

A. I did.

Q. Whereabouts?

A. In Wickes, Montana.

Q. You may describe to the Court whether they were in the cars when you first saw them or not?

A. Yes, they were in the cars when they pulled up on the main line at Wickes.

Q. You may tell the Court what condition they were in.

A. The minute I saw these sheep, I knew they were in very terrible condition. They were down in the north end of the cars, piled on each other in

(Testimony of George M. Melton.)

a hopeless mass, and the conductor walked down——

(Interrupted.)

Q. Just what color were the sheep when they started from [8] Kevin?

A. They were ordinary light-colored sheep.

Q. What color when you found them at Wickes in the cars?

A. They were plastered with a black—this mud and water that had accumulated in the cars in transit somewhere, and they were down being badly tromped and hurt.

Q. You may tell the Court whether the train was running from North to South to get to Wickes?

A. Yes, it was running South, going toward Butte up the grade.

Q. You found the sheep piled in the north end of the cars? A. Yes, sir.

Q. Tell the Court if all of them were alive.

A. Well, we couldn't tell how many weren't alive until we started to unload, but at that time, three lambs and three ewes and two bucks; but there were many down being tromped and hurt.

Q. Did you interview the conductor of that train that had brought your sheep in? A. I did.

Q. While he was in charge of his train?

A. Yes, sir.

Q. What did you tell him?

A. I asked if he was the conductor. He said he was. I said, "I want to show you these sheep, they are in bad shape. [9] I wish you would put them over by the stockyards where we can unload them

(Testimony of George M. Melton.)

at once; we got to get them out of there, they are in terrible condition." He said, "I am sorry, I am ordered to put these sheep on the side track and pull on. There will be another train along after awhile to unload them."

Q. What did he do with your car loads of sheep?

A. He pulled them up and pushed them in on a side track at Wickes, which was an even steeper grade at Wickes than the main line itself, and left them there where we could only get at them as best we could. We tried to go in.

Q. Close to any loading platform?

A. No. They spread what cars they could past the loading platform, and some to the south of it, but they weren't in position, as I remember it, except one car that we could work on near the loading platform.

Q. How long did the cars remain there before they were properly spotted so you could unload your sheep?

A. I think it was an hour or an hour and a half; it seemed like a long time to me; it might have been two hours, but I would say one hour to an hour and a half.

Q. What was the value of your car loads of sheep in that shipment when they left Kevin in that shipment? Have you got the exact figures on what you paid for them?

A. \$28,165 is what they cost me at Kevin.

Mr. Gough: Would you repeat that, please? [10]

A. \$28,165.

(Testimony of George M. Melton.)

Q. If they had arrived in good condition at Wickes, what would have been their value there?

A. They would have been worth what I paid for them, \$28,165, plus freight.

Q. How much was the freight?

A. Approximately, as I remember, 60c a head, which is about \$600.

Q. If they had arrived in good condition at Wickes, they would have been worth twenty-eight thousand seven, how much?

A. Seven hundred sixty-five.

Q. There was a little more freight because of the little excess over?

A. Yes, it would be a little over that, but approximately that.

Q. I see. It would be slightly over that?

A. Yes.

Q. When the sheep were first unloaded and you could look them over and determine and see what condition they were in there at Wickes, what was the market value of your sheep then?

Mr. Gough: I object, your Honor, unless the question is confined to the actual condition of the sheep as unloaded at Wickes. It has to be pinned down in such fashion that the description of the sheep as injured, whatever happened during the shipment—— (Interrupted.) [11]

Mr. Maury: He is an expert on sheep, buys them by the thousands and knows what the value is.

The Court: I think that all counsel wants is, before you place a value on them, to describe their

(Testimony of George M. Melton.)

condition. He wants a description of the condition of the sheep before you place a value on them.

Mr. Maury: We are perfectly willing to furnish that, the condition insofar as it could be determined at that time.

The Court: Well, at that time, just as soon as he found out what the condition of the sheep was; give a description of them.

Q. (By Mr. Maury): When the sheep were unloaded and you could tell at Wickes what the value of those sheep was, what was their condition? Describe it in detail, Melton.

A. Well, these sheep were down badly in the north ends of every car, and we waited for the power to come. We did unload, I think, two decks that we were able to jump down on the dike, and one deck on to the loading chute. The others we were helpless to get at. We found that there were many ewes, when we finally got to the stockyard unloading chute, that couldn't get up. They were down, to all intents and purposes, dead. They were badly injured, but still alive. My son would crawl into the cars, pick them up and drag them out by hand. Sometimes they would get up and wobble out and walk down into the stockyard, where they would lay down; but our field was [12] just about 50 feet from the stockyard. We swung the gate open and left them drift right into where there was good feed through the gate. Then, the lambs had been covered worse than the ewes with a black muck, it just completely covered those lambs from

(Testimony of George M. Melton.)

head to foot, at least 300 of them. They were black as pigs, and the ewes were tromped and hurt, and black, too, with this same sand and muck that had gotten into the cars.

Q. Can you tell if that muck was greasy and sticky?

A. It was very sticky; it didn't wash off with rain or anything. It stayed on the lambs most of the summer, what lambs survived.

Q. How about the bucks?

A. Well, the bucks were down some, and there were two of the bucks were dead. We jumped the bucks out, as I remember on the dike because they were stout fellows, and got them away. We didn't want to mix them in with the ewes.

Q. How long did it take you to discover how serious the injuries were to your sheep and lambs and bucks, and how many were injured?

A. Well, we immediately noticed that these ewes that had been hurt from a combination of the fact that they were hurt—they were like a milk cow, I guess, they had been giving milk—from the fact they were hurt and the fact that their lambs had been covered by muck, and they identify their lambs by smell, the combination of the two things made them refuse, those that [13] had any lamb refused to claim the lamb and just laid out around in the field sick, and the lambs couldn't and didn't nurse, and as a consequence, we began to see right away that a lot of the lambs were what we call bums; in other words, their mothers deserted them.

(Testimony of George M. Melton.)

They were on their own from there on. They got no more milk, and as a consequence, they became wind-bellied or pot-bellied lambs. That is called a bum. He has no mother and he has no milk, and if he lives at all, he eats coarse grass, and it doesn't do any good.

Q. Did you keep those sheep separate from another band which came to your ranch a week or two later? A. We did.

Q. How long did you keep them separate?

A. We kept this band separate all summer. They were branded with a green brand, as I remember, and the other band with a red brand. We never mixed these sheep.

Q. Did you keep count of how many of the lambs were bums, as you call it?

A. Yes, they would gradually show up as they began to starve and fall back, and my estimation, after they got up and I could see which ones were going to try to make it, and which ones had given up, there was about 300 ewes that had been hurt and injured, and about 300 or more lambs were black-doped up and marked so there would be a question of whether their mothers would take them or [14] not.

Q. When did you dispose of that herd of sheep, or flock of sheep?

Mr. Gough: To which I object if the question is used to assess damages to the plaintiff at the time of this particular incident. The time must

(Testimony of George M. Melton.)

be limited to the market value at Wickes at the time of delivery.

Mr. Maury: That is just what we first asked the witness, and we now repeat the question.

The Court: He is withdrawing his previous question.

Q. Mr. Melton, what was the market value of that shipment of sheep at Wickes when they were first unloaded from the cars? Now, by market value, I mean, what would a person who wanted to buy sheep in large numbers and had the money to pay for them be willing to pay then for that band of sheep, and what you, as the owner, would have been willing to sell them for at Wickes at that time?

A. I don't believe that band of ewes was worth over \$20,000.

Q. And by that, do you mean the entire band, bucks, lambs and ewes?

A. I do; for the reason that there were a number of them were seriously hurt and they were really unmerchantable; you couldn't have sold them to anybody because of the bum condition of the lambs and the crippled and feverish condition of the ewes. I wouldn't have given over \$20,000 for them, and would have hated to take them at that, but we were stuck with them [15] and had to stay with them.

Q. At that time, your loss was the difference between what you had paid for the sheep and 60 cents a head freight, and \$20,000?

(Testimony of George M. Melton.)

A. Yes, sir.

Q. Did you do everything reasonable and proper to diminish your loss as well as you could that summer?

A. Yes, we went along and salvaged some, whatever we could. We kept a close record of them. The bums brought some, and the lambs that died were gone, and the ewes that died were gone; and a lot of the ewes that were hurt, after they dried up, came out of it. We kept a good and fair count as I could, and I just remember of inviting the Great Northern—— (Interrupted.)

Q. By the way, when did you first notify the Great Northern Railway Company of the condition of your sheep, I mean after this statement you made to the conductor on the train?

A. It was just a matter of days until I could get down to the agent at Clancy. I believe that is the next place I contacted them, as I remember it.

Q. Were the sheep sheared soon after that?

A. Sheared about 30 days after that, if I remember.

Q. What, if any, notice did you give the Railway Company to inspect the sheep after shearing?

A. I wired the superintendent, as I remember it, that—— (Interrupted.) [16]

Q. By the way, have you got a copy of that wire?

A. I don't remember that I would, unless I gave it to you.

Q. Did you keep a copy of the telegram?

(Testimony of George M. Melton.)

A. Yes, sir, that is a copy of the telegram I sent at the time.

Mr. Maury: The telegram has no date; we don't know the date exactly.

Mr. Gough: I assume this was sometime after June 10th?

The Court: I think before any discussion or question with reference to it, it had better be marked for identification.

Mr. Maury: Yes.

Mr. Gough: May I ask a couple of questions?

Mr. Maury: Yes.

Mr. Gough: Mr. Melton, we have what has been marked for identification Plaintiff's Exhibit 3, purporting to be a Western Union telegram from yourself to the office of the superintendent of the Great Northern, First National Bank Building, at Great Falls. It refers to two shipments of sheep, one of May 30th and one of June 10th, from Kevin to Wickes, advising you will shear this band on Friday, June 24th. Are you acquainted with the superintendent of the Great Northern at Great Falls?

A. I have met him occasionally, yes.

Mr. Gough: Do you know one Frank O'Hara?

A. I do. [17]

Mr. Gough: He is not superintendent, is he, of the Great Northern?

A. I am not sure; I don't think so.

Mr. Gough: At the time you sent your telegram, did you make an extra copy of the telegram?

(Testimony of George M. Melton.)

A. Yes, I believe that is the copy right there. It looks like my typewriter. I think that is a copy.

Mr. Gough: Can you identify that as a copy of the telegram you undated and sent the original?

A. Yes, I would, I believe that is the copy from the looks of my typewriter. I am sorry there is no date on it.

Mr. Gough: I assume it must have been sometime subsequent to June 10th?

A. Yes, but I recall I did notify the railroad before that for this reason—— (Interrupted.)

Mr. Gough: I am only asking about this particular telegram; I am not examining you. Would I be right in saying it was after June 10th?

A. Yes, it was after June 10th, because both shipments were as stated—— (Interrupted.)

Mr. Gough: I object to the introduction of Plaintiff's Exhibit 3 as irrelevant and immaterial in view of the fact it happened after the shipment of sheep here involved, and the damages in this action is the market value at the time of the delivery at Wickes, and not at some subsequent or speculative [18] date.

The Court: The objection is overruled and the exhibit is admitted.

(Plaintiff's Exhibit 3, here received in evidence, is as follows:)

(Testimony of George M. Melton.)

“Western Union

“Office Superintendent

“Great Northern Railway

“First National Bank Bldg.

“Great Falls, Mont.

“Notice adjusted amount freight on two shipments sheep May 30 and June 10th from Kevin to Wickes at hand first shipment received in bad order stop withholding freight due until satisfactory settlement is made advise claim department will shear this band Friday, June 24th, send claim agent to Wickes ranch that date when we can show him accurate data on loss and condition.

“GEORGE M. MELTON.”

Q. (By Mr. Maury): Mr. Melton, did anyone representing the Great Northern inspect the sheep after?

A. Yes, they did send up a veterinary from Great Falls. The reason I remember I must have notified them before the 10th is that I remember the veterinary, claiming he had been sent by the Great Northern people, came to the ranch the day we unloaded the second shipment, which was June 10th.

Q. As to the second shipment, they arrived in good order?

A. Yes. He watched us unload the second shipment.

Q. They were in good order?

(Testimony of George M. Melton.)

A. Good order. They were half of these [19] sheep.

Q. Was that a shipment of ewes and lambs?

The Court: That is immaterial. Let's not go into another shipment, it is bad enough to try to keep track of one.

Q. Mr. Melton, have you been paid for your loss on those sheep by the Great Northern or anyone else? A. No, sir.

Mr. Maury: Cross-examine.

Cross-Examination

By Mr. Gough:

Q. Mr. Melton, as long as we are on it now, didn't you, either on May 31st or June 1st, have an attorney employed by you advise the Great Northern that the loss to these sheep—— (Interrupted.)

A. Not as I remember, not as early as May 31st, because that is the day I got in. I had no attorney at that time.

Q. It may have been on June 1st, the day following? A. No, sir.

Q. You did not? A. No, sir.

Q. Did you authorize Mr. Schulz, attorney at Dillon, on or before June 1st to present a claim to the Great Northern Railway Company by reason of this shipment of sheep?

A. Just as soon as I got home. It might have been June 1st. Just as soon as I got home, I took

(Testimony of George M. Melton.)

it up with him to present a [20] claim. The reason I said no first, I thought it might be as late as June 2nd or 3rd. It could have been June 1st.

Q. So I won't embarrass you, sir, I have a letter here in my hand dated June 1, 1949, from Mr. Schulz, your attorney, addressed to the Great Northern Railway Company. A. Yes.

Q. For injured sheep arising out of this particular shipment. Do you think that is probably the right date? A. Yes, approximately.

Q. At that time, Mr. Melton, what did you consider to be the damage?

Mr. Maury: I object unless you show Mr. Melton the letter you are speaking of.

The Court: Better mark it for identification if we are going to be talking about the letter. What is the purpose of this?

Mr. Gough: I wasn't going any further with it.

Q. I hand you what has been marked for identification as Defendant's Exhibit 4, and I will ask you if you will read that, please? Just read it to yourself.

The Court: I can read it myself if it is ever admitted in evidence.

A. Yes, sir, that is it. At that time, as I stated before, we showed three ewes and three lambs dead, about 100 ewes badly hurt, but, of course, as it went on, it developed that there [21] were a number of bums, and more hurt, because right at that time they were hurt at that time, but to determine exactly how many was hard because they were lying

(Testimony of George M. Melton.)

there in the field, and we kept watching them, and on my first notice, of course, I estimated 100 ewes.

Q. Do you know Mr. Schulz's signature, Mr. Melton?

A. Yes, I would say that is Leonard Schulz's signature. He is present in the court.

Q. I notice in here you assessed the value of your lambs and ewes at \$28 a pair?

A. That is what I paid for them.

Q. Two bucks at \$30 a head? A. Yes, sir.

Q. You state there were three lambs and three ewes dead and one buck dead?

A. They were dead in the cars.

Q. You mean by that they were dead at the time they arrived at Wickes?

A. They were dead in the cars. They might have been dead before, but they were dead in the cars.

Q. You don't know where it happened, of course? A. No.

Q. Now, Mr. Melton, going back up to Kevin on May 30th, 1949, approximately what time did you arrive at Kevin that morning?

A. About ten o'clock. [22]

Q. Where did you stay the night previously?

A. Great Falls, as I remember.

Q. You drove up in the morning?

A. Yes.

Q. Who was with you? A. Jack Thomas.

Q. Mr. Thomas was acting as agent for you or in your employ?

(Testimony of George M. Melton.)

A. No, I was buying the sheep from Mr. Thomas. He had bought them from Mr. Potter.

Q. He was the middleman? A. Yes, sir.

Q. The two of you arrived up there about 10 o'clock, you say? A. Yes, sir.

Q. Were any sheep in the yards there at Kevin at that time?

A. I think the bucks we were going to ship. They brought them in ahead of time. Our 74 bucks, when I first got there, were in the yard.

Q. The ewes and lambs, where were they?

A. Up the road aways in two bands.

Q. These sheep had come from the Potter ranch, is that right? A. Yes.

Q. Approximately how far from Kevin is that ranch?

A. It is about six miles, but the sheep had moved in part of the way during the night down to the end of his field, so they [23] were only moved a comparatively short distance that morning.

Q. Approximately how far do you think they moved? A. About two miles.

Q. That move of two miles was made during the morning? A. Yes, sir.

Q. During the night, were they held in the Potter field? A. Yes, sir.

Q. Were they in sheds? A. No, sir.

Q. When had you previously seen the sheep prior to May 30th?

A. I think about a week before.

(Testimony of George M. Melton.)

Q. That is when you made your deal?

A. Yes, sir.

Q. You didn't send them or bring them to Kevin in the interim period? A. No.

Q. When you got to Kevin that morning, was it raining?

Mr. Maury: We object. The only purpose of that could be to show that the sheep were not in good condition. The bill of lading recites that the sheep were in apparent good order.

The Court: Denied, overruled.

Mr. Maury: We except, and may our same objection go to all this line of testimony?

The Court: Yes. [24]

Q. You may answer.

(Question read back by reporter.)

A. Yes, it was sprinkling just a little bit.

Q. Sort of a drizzle? A. Yes.

Q. Were cars available for you to load at the time?

A. Not right away, as I remember it. The cars might have been in, but I don't remember whether power was there.

Q. I assume that Mr. Potter and his herders or help were along. Were they there present?

A. Yes, they came along.

Q. You say the ewes and lambs were held off?

A. Yes.

Q. When did you bring them in?

A. Well, when the power got there and we saw

(Testimony of George M. Melton.)

the weather was breaking where we could have a reasonable chance to load them in good shape, we ordered them in, and they moved down in two bands into the yards.

Q. What time was that?

A. I think we got them down there—we probably got to Kevin a little earlier, but it was maybe 10:30 or 11:00 o'clock.

Q. The power was there at that time?

A. Yes, I think it was.

Q. You say you held them off to see if you could load them in good shape. Do you mean if they had been wet, you wouldn't [25] have loaded them?

A. Too wet, yes.

Q. What is the result of loading sheep when it is too wet?

A. It isn't necessarily fatal, only with ewes and lambs, you are especially careful not to load them wet.

Q. Is it true when loaded too wet and under those conditions, that this loss of scent that happened between the ewes and lambs may occur and you will have bum lambs?

A. Not always, but the risk is greater if they are real wet.

Q. How old were the lambs?

A. They were born in April; I would say 30 days to six weeks old.

Q. Approximately a month old, along in there?

A. Along in there.

Q. Were they good, strong, healthy sheep?

(Testimony of George M. Melton.)

A. Yes, this was the leading band that had been lambed out first. They were the best of two bands, and every lamb, so far as we could see, had a mother.

Q. When you started to load, you said it was about 10:30? A. Yes.

Q. The bucks were in the yard?

A. Yes.

Q. You loaded the bucks first, did you?

A. Yes, we loaded them first to get them out of the way. We don't permit them to mix in with the ewes at that time of the [26] year.

Q. Was that a full deck, a full car, or what?

A. We loaded them in one deck, 74 head.

Q. Then, did you load the top deck of that car?

A. Later, when the ewes and lambs came in, we first counted them. We had to make two counts on them, which took quite a long time. We had to count the ewes first and then the lambs in order to determine how much I paid for them, because I was buying them by the pair, \$28 a pair, so first, before we did any sorting for loading, we counted them and run them back and forth, which took quite a long time. In the meantime, the sun had come, and we had a little break in the weather, and they were rapidly drying up, and then we informed the agent, "She is all right, we will load."

Q. About what time did the break in the weather happen?

A. Well, along about noon. We weren't ready to roll for an hour or two after we got in there

(Testimony of George M. Melton.)

on account of the counting and getting ready to settle.

Q. The power was there all this time, was it not?

A. As I remember it, I believe it was.

Q. By power, you mean the engine that hooked on the stock cars?

A. Yes. I think I saw the engine there.

Q. What had your original plan been on shipping the sheep? Did you intend to load them immediately on their arrival at [27] Kevin?

A. If they were in condition to load, yes, we would have loaded them. We were somewhat late because we wanted to be sure we wasn't going to get another shower. At that time there was a big cloud coming up, and I said to Mr. Potter, "If that cloud rains here, we will put them off until tomorrow." We were in no particular pressure to load them, except the power was there, and this cloud went off east. Potter says, "The cloud won't hit here." "It looks to me like it will," I said, but that cloud went off, and I said, "All right, we were in the clear." In moving as we worked them, and the wind was real brisk, the animal heat of these ewes and the wind, they will dry real rapidly. These ewes were in good shape by the time we got them ready to deck out.

Q. As I understand, you loaded the bucks about 10:30, and didn't load any ewes and lambs until noon time, is that correct? A. That's right.

Q. When you started loading, did you load the

(Testimony of George M. Melton.)

ewes and lambs all at once? I mean, just continue loading?

A. I think we did. We might have stopped for a minute for a cup of coffee between the two bands. We kept them in small bands, 412 in one band. We loaded them into separate cars and kept them separate. That is why we consigned them separately, so in case they had to be fed in transit, the stockyard people will keep them separate. That gives those lambs a chance to [28] find their mothers easier than if we had thrown them together.

Q. You didn't put all the ewes and lambs together at any time?

A. They might have been in the stockyards, but in different pens, so we could identify the two bunches.

Q. Mr. Melton, your friend, Mr. Thomas, was there with you? A. Yes.

Q. Does he live in Montana?

A. No, he lives in Idaho.

Q. Do you know whether or not he was planning on returning to his home that day?

A. I suppose he was.

Q. Like all sheep buyers, he was moving fast?

A. Yes, he moves fast.

Mr. Maury: He is here in Court.

Q. What type sheep were they, Mr. Melton, were they Columbias or Crosses, or what?

A. They were Columbia Cross ewes.

Q. What kind of bucks had they been bred to?

A. White face bucks.

(Testimony of George M. Melton.)

Q. Cross bred? A. Yes.

Q. I think you stated you finished your loading about two o'clock in the afternoon?

A. As I remember it, yes. [29]

Q. And, I assume after the sheep were loaded and billed, you left Kevin? A. Yes.

Q. After 12 o'clock noon, when you say the weather cleared, and before 2 o'clock when you say you completed loading, had there been any more rain? A. No.

Q. Was the sun shining?

A. It came out intermittently, as I remember it.

Q. Where did you go after you left Kevin?

A. I pulled into Great Falls and stayed there that night so I could strike out and be at Wickes ahead of the sheep the next morning.

Q. So, you drove from Kevin to Shelby, Shelby to Conrad, Conrad to Great Falls, is that right?

A. Yes, sir.

Q. Did you pass through any rain during that journey? A. What time?

Q. Whenever you made it after you loaded the sheep?

Mr. Maury: We object. That is not proper cross-examination, and it is not relevant what happened after the carrier gets the cargo.

Mr. Gough: It is certainly relevant, your Honor. We are not responsible, one of the few things for which we are not responsible is the rain which comes from the heavens. We [30] cannot control it.

(Testimony of George M. Melton.)

Mr. Maury: Yes, you are, under the statutes of Montana, you are.

The Court: The line of the train is the same as the highway, is it?

Mr. Gough: Yes, sir.

The Court: Proceed, the objection is overruled.

Mr. Maury: We except.

A. As I remember it, along toward evening in Great Falls, it got threatening and started to rain again.

Q. That would be the evening of May 30th, 1949? A. Yes.

Q. By the way, that was Memorial Day, was it not? A. Yes.

Q. You didn't see the sheep during the journey?

A. No, sir.

Q. Now, at Wickes the next morning, approximately what time was it when you arrived?

A. About 10:30. I was there at 9:30. We waited until we could see the engine pull up. We could see it from our house there.

Q. It was about 10:30 when the train pulled up?

A. Yes.

Q. Where, in the train, were your eight cars of sheep?

A. They were pretty close to the head end. [31]

(10-minute recess.)

Q. Mr. Melton, we were talking about the sheep at Kevin. As I understand it, the train had arrived about 10:30. You saw the train pulling up

(Testimony of George M. Melton.)

that grade. Did they pull by as they came up the main line?

A. Just a minute, I think you said Kevin.

Q. I mean Wickes, I am sorry.

A. At Wickes, you mean?

Q. At Wickes, I was in error.

A. Yes, as I remember it. We can see the train quite a distance. We went down and stood in the stockyards as the train pulled up.

Q. On the main line?

A. On the main line.

Q. At that time, as I understand it, you noticed the sheep were piled up in the north ends of the cars? A. Yes.

Q. Now, by the north end, you mean the end towards Great Falls? A. Yes.

Q. And the power would be the south end, the direction in which the train was going?

A. That's right, yes, sir.

Q. What happened after the train pulled up there?

A. Well, I asked the conductor to put them over to the stockyard at once so I could unload them because they were in bad [32] shape. You could see smoke and steam and hear them blatting. I said, "Come over here, will you, Conductor, I want to show you these sheep? They are in bad condition." He was walking away.

Q. Where did this conversation take place?

A. Right on the right-of-way, standing right by the train on the main line. I don't know the con-

(Testimony of George M. Melton.)

ductor's name. I asked if he was the conductor, and he said, "Yes."

Q. Yes, go ahead.

A. He said, "I am sorry, I have got orders to go on with the rest of this freight, and I have to put them on the side track." I said, "Will you put them where I can jump them out on the dike or something? We can work them until the other train gets here." He didn't answer me, but he had them push the cars in on the side track and unhitched and left them.

Q. You mean the track that serves the stock-yards?

A. Yes, I mean the track that serves the stock-yards. It is the only side track at Wickes.

Q. Did you ask him to spot any particular one car?

A. I asked him to spot them all if he could, one right after another. I think, as I remember, one did stop by the unloading chute so we could get at them.

Q. Was that a car you picked out or just happened to hit there?

A. No, it just happened. He pushed the string by, and one [33] happened to be right by the platform. I remember it was not well spotted, but we could work on it a little bit.

Q. At that time, Mr. Melton, these sheep were piled up in the ends of the car?

A. Yes, sir.

Q. Was that in all eight cars?

A. Yes, sir.

Q. It was uniform?

(Testimony of George M. Melton.)

A. Every car was in bad shape.

Q. By piled up, would you explain what you mean in a sheepman's terminology?

A. They had been bumped down into the ends of the car and rolled on top of each other and piled into each other in a bad mess where they can't get up.

Q. When sheep pile up, they actually pile up on top of each other, do they not? I mean, there may be two or three sheep deep in the pile, is that right?

A. They can't get up high because the deck is over their heads, but they will roll into the end where they slip and get trapped in there.

Q. That was the condition in which the cars arrived at Wickes? A. Yes, sir.

Q. The power, you say, had left the train and went on. What did you do? [34]

A. My son and I looked over the situation, and we unloaded—we got one of the unloading boards from the stockyards and put it down on the dike which runs along side, and we unloaded the deck-load of bucks, let them off. They were in the lower deck, as I remember it, and anyway, we got them off out of the car.

Q. And I assume you took them all away so they wouldn't mix with the ewes?

A. Sent them on up to the ranch and got them out of the road.

Q. That was in one car. What did you do to the other seven cars?

(Testimony of George M. Melton.)

A. We had to leave them there. I think we worked on one other car that was in the stockyards.

Q. That car near by the chute that you were working on, how long did it take you to unload it?

A. Quite a little while because it wasn't exactly spotted where the boards would adjust, but we worked at it, and I think we got one deck of that unloaded.

Q. Before the power arrived? A. Yes.

Q. Did you have to go into the car and unscramble these sheep?

A. Yes, my son went in every car, crawled in to get the ewes out. After the ones that weren't down got out, the others had to be helped out, dragged and pulled out.

Q. Was that because they had become stiff?

A. They had been tromped and were sick and they just wouldn't [35] get up, just laid there and gave up.

Q. They were lying down? A. Yes.

Q. Now, were there any objective symptoms, obvious signs of cuts on the animals, open cuts or bruises?

A. Only this, that the wool was tromped off a lot of them, and the skin was bruised where the hooves had tromped the wool off.

Q. Were the sheep wet when you unloaded them?

A. Yes, sir, wet and covered with a black, oily muck.

Q. There was no question about them being thoroughly soaked when you unloaded them?

(Testimony of George M. Melton.)

A. No, sir; soaked and plastered with mud. Where they got the moisture, I don't know.

Q. What time did the power arrive to unload the sheep?

A. As I remember, it was about an hour after the other train pulled out.

Q. Approximately 11:30, then?

A. I would—yes, well, 11:30, about an hour.

Q. After the power was connected up to your sheep cars, you commenced to unload?

A. Yes.

Q. How long did it take you to unload?

A. Well, we went along as rapidly as we could, because the sheep were in bad shape, and we know our business very well; it [36] doesn't take long, except Bobby, my son, crawled in every one of those cars up to the ewes unable to walk. He went in and steered them out, stood them up, and if they couldn't walk at all, he dragged them out and we pushed them down the unloading chute.

Q. Did it take two hours, three hours, how long did it take?

A. No, it wouldn't take as long to unload as to load because the minute you open the door, the ones able to walk go out. I don't think we were over 10 or 15 minutes on each car. It doesn't take too long to unload.

Q. You think about 15 minutes?

A. I think so.

Q. As I understand, you had already unloaded

(Testimony of George M. Melton.)

the deck of bucks and one deck from another car, is that right? A. Yes, sir.

Q. So you had six full cars and two extra top decks to unload, is that right?

A. That's right.

Q. You think about 15 minutes a car to finish it up? A. As I remember, yes.

Q. During the time the train was at the siding at the stockyard before the power came to unload it, did you get in the cars, or anyone else working for you?

A. We didn't get in. We took some sticks and tried to push some ewes away from the piles, push them down to the south [37] end of the cars. We worked on them some.

Q. Is it true sheep are prone to pile up and suffocate? That has happened?

A. Oh, yes, sheep is a very peculiar animal.

Q. I don't mean just in freight cars, it happens elsewhere?

A. Yes, it has happened, but not if they are properly handled.

Q. Anything can happen to sheep, can't it?

A. Yes, I guess.

Q. You have had it happen in your experience. After that unloading had been completed, Mr. Melton, I understand you had a hospital band left around the house?

A. No, I don't remember we had any hospital band. We just let the ewes and lambs lay right in the fields because they were on good feed and

(Testimony of George M. Melton.)

close to water, close to the stockyards. We had no hospital band then, we just let them lay out and rest and see if they could make it.

Q. How many days did they stay there?

A. I think four or five days.

Q. Then, I assume you took them on to the range?

A. We moved them on, getting ready for the next half of the sheep that were coming in the next shipment.

Q. Is it true, Mr. Melton, that from a band of this size, over a thousand head of ewes and 900 odd head of lambs, would you expect to have some bum lambs?

A. Not many if they are properly loaded, and we were careful [38] to load them. We only loaded around 70 to give the ewes plenty of room, and we were careful to count in that number of lambs, or usually less. We didn't have 100 per cent. We find if you load carefully, with two counters, one counting the lambs and done counting the ewes, and if too many lambs run down, drive the lambs back. We never try to get a lamb with its mother. That is physically impossible, but the mother will smell it, if they are unloaded every 24 or 36 hours, as they are supposed to; and they ship bands all over the United States, all over the West.

Q. You could not mother up the sheep even before you ship them?

A. Only what we call mother up, yes. We stopped out and gave them a chance to settle, out

(Testimony of George M. Melton.)

while we were waiting to see if the weather was going to clear. They all find their mothers.

Q. After they go into the pen?

A. We don't bother from then on except to get them in the cars in proper numbers.

Mr. Gough: That is all, sir.

Redirect Examination

By Mr. Maury:

Q. Mr. Melton, ordinarily, would it be such a high percentage of lambs bummed as there were in this flock? [39]

A. By no means, no sir.

Q. Mr. Gough asked you if you had experienced some loss by bumming of lambs. About what percentage of loss is that in an ordinary flock?

A. Very small if they are properly handled. On the next band, the other half of the ewes shipped 10 days later, there was just one lamb broke its leg.

Mr. Gough: To which I object and move to strike the answer. We are not interested in the subsequent shipment.

The Court: Sustained. It may be stricken.

Mr. Maury: It was gone into by the counsel for the defendant.

The Court: Not that specifically.

Mr. Maury: No.

The Court: You can go into it with reference to his expert knowledge as to what the percentage is, surely. Proceed.

Q. Now, during the summer and early fall, as

(Testimony of George M. Melton.)

long as you kept that flock, did you observe more and more lambs that were orphaned, or bummed, or weaned too early?

Mr. Gough: I would like to put an objection to this line of testimony as being too remote and speculative as to damage sustained at Wickes at the time of the delivery of the sheep.

Mr. Maury: We can follow it up and show there was no other cause than that. [40]

The Court: Very well, proceed.

Mr. Gough: May I have an objection to this entire line of testimony?

The Court: Yes. Connect it up, though, Mr. Maury.

(Question read back by Reporter.)

A. We did.

Q. Did you keep a list of them?

A. Yes.

Q. Have you got that list?

A. I have a copy of the list I have from my books, and I have my books there, yes. What was it you wanted to know?

Q. Did you keep a list of those that you observed while they were in your possession that were bums? A. Yes, sir.

Q. How many?

A. Well, at the beginning, as I said, there were about 300 of the ewes that were rolled and tromped, and 300 or more of the lambs were rolled in the muck, but of those, 78 ewes died—— (Interrupted.)

Mr. Gough: I didn't hear that.

(Testimony of George M. Melton.)

A. 78 ewes died, and 149 of the lambs died, and 170 of the sick, feverish and emaciated ewes went along and finally came out of it after a fashion, but they didn't ever claim their babies again.

Q. How many was that last? [41]

A. 170; and there were 154 lambs that were bummed that lived and were sold for culls.

Q. You bought those lambs with the ewes?

A. Yes, sir.

Q. And a price was made when you bought on the ewes and lambs?

A. Yes, sir, what we call a pair.

Q. But if the lambs had arrived and their mothers had owned them and the mothers had been able to nurse the lambs, would those lambs also have a separate value from the mother?

A. At the time they arrived in Wickes, you mean?

Q. Yes, if they had arrived in good order and things had not gone wrong?

A. Yes, I could tell what I believe they were worth in all fairness.

Q. How much?

A. I think at least \$12 for this—— (Interrupted.)

Q. \$12 a head?

A. \$12 a head, because those lambs, if they had been lambed out, identified with their mothers when they hit Wickes, there is nothing more to do then, except turn them in with the herder on the summer range, then, in two and a half or three months, they

(Testimony of George M. Melton.)

are cashed in and sold for lambs. They go to feed lots and packers.

Q. Mr. Melton, have you had experience with sheep and nursing [42] lambs getting wet?

A. They get wet in the rain whenever they are out in the rain.

Q. It is a common thing, isn't it?

A. They are never under cover, you know.

Q. Yes. If they get wet with ordinary rain water, does that interfere with a mother identifying the lamb?

A. Oh, no, if it did, any rain storm would bum all your lambs.

Q. Can you assign any cause, as a sheepman, and we might say, an expert in that line, of these lambs getting bummed outside of the water?

A. Yes.

Q. What cause do you assign?

A. In my opinion, it was a combination of the fact that their mothers were sick and hurt, and consequently disinterested in claiming their lambs, sick and feverish, and the fact these lambs were rolled in a black kind of muck, oily stuff, a combination of manure and some kind of sand they used, which plastered them from head to foot, a combination of those things just fixed them up so the ewes never claimed their lambs, so all summer long, these little fellows dragged along and gradually died off, and that is the record I kept of the dead ones, and when we finally sold, some of the lambs were declared bums and cut back by the buyer.

(Testimony of George M. Melton.)

Q. What would have been—well, can you assign, or was there [43] any other cause there than what you have told the Court why those lambs were bummed?

A. These ewes must have been bumped into the north end of those cars. I don't see how they could have got down so bad unless there had been rough handling of the cars, but that is just speculation on my part. I know they were in bad shape. I have shipped hundreds of cars, and I know when they are in bad shape. It is easy to tell; you don't have to be smart to tell that.

Q. Can you tell the Court about how long the grade is steadily up before it gets to Wickes on the Great Northern?

Mr. Gough: I didn't hear the question; I am sorry.

(Question read back by reporter.)

Mr. Gough: I object to that. Mr. Melton is not shown to be competent to answer. If you want to know the exact amount of railroad grade, Mr. Maury, we will tell you.

Mr. Maury: What is it?

Mr. Gough: 2.2.

Mr. Maury: What distance?

Mr. Gough: Just a minute, I'll find out, I don't know.

Mr. Maury: I have ridden that train thousands of times, I guess.

Mr. Gough: Alhambra to Wickes.

(Testimony of George M. Melton.)

Mr. Maury: What distance?

Mr. Gough: It is something in excess of 12 miles. [44]

The Court: What is the materiality of this now.

Mr. Gough: I beg your pardon?

The Court: What is the materiality of this?

Mr. Maury: Coupled with the testimony that the sheep were all in the north end of the cars.

The Court: What does it prove?

Mr. Maury: That they were jerked.

The Court: That they were jerked?

Mr. Maury: Yes.

The Court: I don't see it, but proceed.

Mr. Maury: The burden is not on us to show it.

The Court: No, you don't have the burden, and it doesn't prove it.

Mr. Maury: We have no burden at all in this case.

The Court: You don't have any burden to prove the train was jerked in any event.

Mr. Maury: All we now have to show is that the sheep were injured.

The Court: Proceed. No use arguing the law at this point.

Q. Was the loss as to the lambs bummed, which you have told the Court, a normal loss?

A. No, it was an abnormal loss.

Q. An abnormal loss? A. Yes.

Q. About what would have been a normal loss on that flock? [45]

Mr. Gough: Your Honor, I renew my objection

(Testimony of George M. Melton.)

to this line of testimony on the damages sustained, as being entirely too remote and speculative. You have to tie this down some way to a date near, at least, to the date of the delivery of the sheep at Wickes, not for the rest of the summer. What might have been normal or abnormal three months later is not material to this lawsuit.

The Court: Mr. Maury, you said at one point, you were going to connect up the condition of the sheep at a later time to prove there was no other cause.

Mr. Maury: Yes.

The Court: What testimony or evidence was it?

Q. (By Mr. Maury): Was there any other cause for this loss in bummed lambs or dead sheep or wounded sheep than the condition that you found them in at Wickes when you unloaded them?

A. No, sir.

Mr. Gough: To which I object.

The Court: The answer may be stricken.

Mr. Gough: To which I object on the ground it has not yet been shown Mr. Melton is competent to testify as to that. If Mr. Melton can tie that up so he can prove he was there present and knows every minute of it, I think the question would be competent.

The Court: I don't think he is going to have to show every [46] minute, but you will have to lay a better foundation than you have laid so far; you have to lay the proper foundation, Mr. Maury.

(Testimony of George M. Melton.)

Q. Mr. Melton, have you personally handled such sheep?

The Court: Not such sheep, these sheep.

Mr. Maury: These sheep?

The Court: Yes.

Mr. Maury: I thought Mr. Gough and your Honor doubted the qualifications of the witness as an expert.

The Court: Not the qualifications of the witness. You are asking the witness to testify no lambs were bummed for no other reason than what the railroad did to them. You haven't laid a foundation for that. Was he with the sheep? Does he know everything that might have happened to them?

Q. How much were you with the sheep after they were unloaded there?

A. Well, my son was with them more than I, but I was there quite often during the summer, and, of course, during the shearing period, and during the summer months, and during the loading of the lambs, and the counting, and that, I took charge of all of that.

Q. How steadily about were you personally there with the lambs and the sheep?

A. Well, enough to see—every few days when I went to the ranch to see how they were getting along. [47]

Q. Did you examine them each time that you went?

A. Yes, we looked over the band very carefully there.

(Testimony of George M. Melton.)

Q. And to note how they were getting on?

A. Yes.

Q. And was there, so far as you could observe, any other cause for this loss in wounded sheep, bummed sheep, bummed lambs and dead sheep than the condition they were in when they were unloaded at Wickes?

Mr. Gough: I renew my objection.

The Court: The witness has testified he was there and inspected the sheep frequently, that he knew the conditions under which they were maintained, and I think a sufficient foundation has been laid. You may answer the question.

A. Repeat the question.

(Question read back by reporter.)

A. Well, we have a natural percentage of loss which would only be fair to take off. We don't figure every one because we have a natural percentage of loss on ewes and lambs during the summer.

Q. About what is that normal percentage?

A. Well, it is very small, and when we was figuring on our losses on this band, we were careful to figure what we thought was a normal loss and subtract that. In other words, 79 ewes died, so we figured 20 ewes would be a normal loss, so we put in a claim trying to be fair with you people for 59, and we [48] did the same as to the lambs.

Q. As to the lambs?

A. Yes. We had 189 lambs, something like that.

(Testimony of George M. Melton.)

We took off 40 lambs because it isn't our policy to try to stick the railroad or anybody for those things that would naturally happen to the band after it has been gotten home.

Q. Discounting that percentage, was there any other cause of the additional loss?

A. No other cause whatever.

Q. Except the condition they were in when they arrived at Wickes?

A. Yes, sir.

Recross-Examination

By Mr. Gough:

Q. You referred, Mr. Melton, to your record book, and I assume it is your book of account on the Wickes ranch operation?

A. This is just a little country list I have here which we keep for ourselves.

Q. I assume you accounted for your bands separately?

A. Yes, we did, we kept them separate.

Q. When was this record made that you finally gave to the Court as to 300 ewes being injured and 300 lambs, out of which 78 ewes died and 149 lambs died? [49]

A. Well, the record shows the sheep I had, what I paid, the sheep I had at shearing time, and the sheep I had at delivery time, so from that I deducted the normal losses. I know of my own personal knowledge what the conditions were at the time.

(Testimony of George M. Melton.)

Q. I assume, Mr. Melton, the record was made after you sold the lambs in the fall?

A. No, I made the first record when I bought from Mr. Thomas. I showed 1016 lambs, so many lambs, so many bucks, cost \$28,126. Then, as it went along, I brought up the record.

Q. I think I didn't make my question clear. You determined your loss after you delivered your lambs in the fall, is that correct?

A. No. We knew there was a loss, but in trying to salvage what we could—the loss was established right there, but if we could salvage any—we would have been glad to give the sheep back to you or anybody, we were stuck.

Q. Not to me.

A. We were stuck with them. We had to try to salvage any bum lambs. If we did, we were willing to put them down as a credit against the loss made at the time.

Q. You had an original record of the bunch, so many ewes, so many lambs, so many bucks?

A. Yes.

Q. You had another check on them at shearing time? A. Yes. [50]

Q. They were in the hands of the herder for the summer grazing? A. Yes.

Q. Did you have the men make a count any time after shearing time?

A. No, I don't think we counted them again until along toward fall.

Q. About the time you were going to market?

(Testimony of George M. Melton.)

A. The herder had all the bills and markings. When we have all the bills and markings, they are sure they have got their bunch, except what naturally die.

Q. The determination of your final loss in this matter was not made until you brought the sheep in and either counted them or delivered them to some buyer in the fall, is that correct?

A. It is partially correct in this: That the loss was made when they were unloaded, and if I were able to get anything from those little or bummed lambs, I was willing to take that off, so it had to be made when they were sold, but it was particularly predicated on the loss at the start and the salvage we got back from them.

Q. As I remember the testimony here, at the time the train arrived at Wickes, and you and your son unloaded them, there were only three dead ewes and two dead bucks—— (Interrupted.)

A. Many more couldn't walk. [51]

Q. Three ewes, three lambs, and two bucks were the only dead sheep on this train, is that correct?

A. Yes.

Q. You, as an expert sheepman, with many years of experience, do you consider it good sheep business to load sheep when they are wet, ewes and lambs particularly?

A. Not if they are dripping wet, no, not sopping so any water could get down in the car. These ewes were not that wet.

Q. I only asked you the one question. Do you

(Testimony of George M. Melton.)

know whether or not the eight dead animals which were dead on arrival in the train at Wickes, did you find them dead under the piles you say were in the ends of the cars?

A. Lying in the bottom of the cars, yes.

Q. Were other sheep on top of them at the time when you unloaded them, or do you know?

A. Bobby, my son, crawled into the cars, I am too old to do that. He crawled in. He could tell you; I think they would be at the bottom.

Q. If you don't know, just say.

A. I don't know.

Q. On this question about the ewes losing the scent of the lamb, as I understand it from you, to make that come about, it is necessary that something more than water be placed on the animal, such as mud, sand, or muck, or some other element?

A. Yes, I would say so, because if you give a ewe a fair [52] chance, she will find her baby. Just rain or water wouldn't necessarily bum her.

Q. You shipped over a thousand ewes, 74 bucks and 900 odd lambs. In such a shipment, would you expect normally to find a small amount of dead, a loss of one or two or three animals?

A. Yes.

Q. That is normal, is it not?

A. That is normal, yes.

Mr. Gough: That is all.

(Witness excused.)

JACK THOMAS

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Schulz:

Q. State your name, please?

A. Jack Thomas.

Q. Where do you reside, Mr. Thomas?

A. Idaho Falls.

Q. What is your occupation?

A. I am in the grain and livestock business.

Q. How long have you been engaged in that?

A. About 13 years.

Q. You say you are engaged in the livestock business. Will [53] you elaborate on that?

A. I buy livestock, and also run sheep.

Q. You run sheep as well as buy and sell sheep?

A. That's right.

Q. Where were you on May 30, 1949?

A. Kevin, Montana.

Q. You were present with Mr. Melton when you received a band of sheep for loading?

A. Yes.

Q. Did you participate in the loading of those sheep? A. I did.

Q. What time did you complete the loading operation?

A. That I can't say, but I would say it was around two or three o'clock, in there somewhere.

Q. As I understand it from Mr. Melton's testimony, he had purchased these sheep from you?

(Testimony of Jack Thomas.)

A. That's right.

Q. What would you fix the reasonable value of those sheep at Kevin, Montana?

A. \$28 a pair.

Q. What would be the total value of that band?

A. I don't know exactly, \$28,126, I believe.

Mr. Gough: If it please the Court, it might help hasten this. Defendant admits the value of \$28 a pair.

Mr. Maury: He can give the exact figures he did pay for [54] them in his checks.

Mr. Gough: We don't challenge the figure at all.

Q. What was the condition of these sheep at the time you loaded, as to whether or not they were in proper condition for being loaded and shipped?

A. These sheep were in good condition. That is one thing I insisted on. It started sprinkling a little. We told them if it rained, we would leave the sheep. We would have left them. I sure wasn't in any hurry. I insisted on that because I had a mortgage on the sheep.

Q. When did it start raining?

A. There was—it started sprinkling that morning. There was no more rain until I was half way home that evening before I run into any rain at all.

Q. Did you have any occasion to see the same sheep a few days later?

A. Yes, George called me up. I think I came back four days after they were unloaded.

Q. Where did you see the sheep?

A. Wickes.

(Testimony of Jack Thomas.)

Q. What was the condition of the sheep at Wickes?

A. In terrible condition.

Mr. Gough: To which question I want to put in an objection until the witness is properly qualified, and further, we believe this evidence is incompetent, irrelevant and immaterial [55] in this cause in that anything, or any evidence Mr. Thomas might give as to something that happened subsequently, unless he saw the sheep unloaded, I believe is incompetent here.

The Court: That is what we are looking for ultimately, is to find out what condition the sheep were in at the time they were delivered at Wickes, that is true enough, but life just doesn't work that way, you can't pin it down that closely.

Mr. Gough: I can try.

The Court: You can try. You may answer the question.

A. Repeat the question.

(Question and the answer given read back by reporter.)

A. That's right. Mr. Melton took me out in the field where they were, and, of course, I don't have the numbers, but several of them were just black.

Q. By several—could you give us a more definite number?

A. There was two or three hundred anyway, I don't know the exact number.

(Testimony of Jack Thomas.)

Q. Two or three hundred ewes or lambs?

A. The lambs were terrible. They had no milk and were having an awful time to even move.

Q. Based on your experience in buying and selling sheep, what would you fix the reasonable value of those sheep at when you observed them at Wickes?

A. I would hate to give \$20,000 for them when I saw them.

Q. Now, in arriving at that value of \$20,000, Mr. Thomas, [56] do you have in mind what you would have been willing to pay for them if you were anxious to buy and Mr. Melton was prepared to sell?

A. I'll tell you, in the condition they were the day I saw them, I wouldn't have been anxious to buy them at all because it is too uncertain.

Mr. Schulz: You may cross-examine.

Cross-Examination

By Mr. Gough:

Q. Mr. Thomas, when did you buy those sheep from Mr. Potter?

A. That I couldn't tell you. I would say probably a couple of weeks before. I wouldn't know the exact date.

Q. About how old were the lambs when shipped?

A. That particular band, I would say five or six weeks old. They were April lambs, and we shipped them on the 30th of May.

Q. You rode up to Kevin with Mr. Melton?

(Testimony of Jack Thomas.)

A. He rode up with me.

Q. One way or the other. You got there about what time?

A. I think we were there probably by eight o'clock, or probably ten o'clock, I can't remember. We left Great Falls quite early.

Q. Did you pass through any rain on the way to Kevin?

A. No rain. It was sprinkling and it was stormy. That is when we decided if it was raining, we would not load the sheep, [57] we would wait another day, because we was in no hurry to get away from there.

Q. When you arrived at Kevin, were the sheep in the stockyard?

A. No, they were out about a mile.

Q. Being held by the driver?

A. No, working them in, grazing them in.

Q. Did they come in over Mr. Potter's land, or did they come down the road?

A. I don't know whether it was Potter's land or not, but they were off the road.

Q. You, of course, don't know when they started in?

A. No, I don't have any idea.

Q. Where did they put them during the night?

A. Between his ranch and Kevin, I know that.

Q. The bucks were in the pens, were they not?

A. Yes, the bucks were in the pens when we got there. They were there first.

Q. Was the power there, the engine?

A. I have been trying to remember. I don't

(Testimony of Jack Thomas.)

know; it seems to me the power got there after we got there.

Q. Do you remember about when you started to load?

A. I would say about 10 or 11 o'clock, maybe noon.

Q. After you commenced the loading operation, did you load all the ewes and lambs at once? [58]

A. They came in two bands. We loaded one band first and then loaded the other band. We kept them separate, kept them in small bunches.

Q. I understand the bucks were loaded first from what Mr. Melton said?

A. I don't recall whether they were loaded first or not.

Q. Do you recall anything to this effect, Mr. Thomas, as to debating amongst yourselves, probably Mr. Melton, and maybe Mr. Potter, as to whether or not it would be advisable to just send down three car loads of sheep? Do you remember anything like that taking place that morning at the Kevin stockyards, May 30th, 1949?

A. I don't recall that.

Q. Do you recall anything of this kind: Telling the agent of the Great Northern that if those sheep were wet or any more rain came up, that you wouldn't load any further sheep, after having loaded three cars?

A. I recall telling the agent if we had a big rain, we wouldn't load the sheep, we would load them

(Testimony of Jack Thomas.)

tomorrow, because that is not just the ideal conditions to load them under.

Q. Do you recall anything like this: About noon, I understand the sun came out; didn't it brighten up? A. It was before that.

Q. Whenever it happened, and that you said "it was brightening up and you wanted to return home, go ahead, load them"? [59]

A. The sheep were dry; I didn't say that until they were dry.

Q. Were you returning to Idaho?

A. Going back that night.

Q. You had your wife's car with you?

A. Yes.

Q. And for that reason you wanted to get back?

A. That wasn't the reason I wanted to get back. I had a lot of things to do.

Q. You think, then, these sheep, at the time they were loaded were in a sufficient degree of dryness to be safe?

A. The sheep were dry when loaded.

Q. You don't know what happened after, Mr. Thomas?

A. No; no, that is the last time I saw them until I came back up.

Q. Would you, as an experienced sheepman, load wet sheep?

A. Not if I had feed there I wouldn't, because it is not the ideal condition.

Q. It is unsafe?

A. Not necessarily; it is better if they are dry.

(Testimony of Jack Thomas.)

Q. The possibilities are greater for loss when they are loaded wet than if they are dry?

A. The reason I don't like to load wet sheep, they jam up too much.

Q. It is a natural incident that wet sheep will jam up? [60]

A. They don't run right, they are cold.

Q. They will get stiffened up?

A. Not necessarily.

Q. But it may happen?

A. I have never had that experience.

Q. You owned the sheep, as I get it, at this time?

A. What?

Q. Did you own those sheep?

A. For a few days, yes.

Q. I mean there was a period in there where you owned them? A. Yes.

Q. You sold the bucks to Mr. Melton at \$30 a head?

A. I can't remember the figures on that.

Mr. Gough: Maybe Mr. Maury would have it?

Mr. Maury: I have the exact amount paid to Potter. I understood you sold them again to Melton at the same price? A. The same price.

Q. (By Mr. Gough): There was no spread, difference, between your price and Mr. Melton's?

A. I bought the sheep and I was to have some range to run them on. The thing didn't materialize, so I sold them to George.

Q. Did you have any difficulties loading these sheep?

(Testimony of Jack Thomas.)

A. No, just the normal difficulties.

Q. Do you have an exact remembrance of the time of the completion [61] of the loading operation?

A. The only thing I remember, we got back to Great Falls at seven o'clock, and it took us an hour to settle up.

(2-hour noon recess.)

Q. Mr. Thomas, you stated you had looked over the sheep at Wickes some few days after they were received down there? A. That's right.

Q. You made an overall estimate of their value at that time of, I believe you said in this fashion: You wouldn't give \$20,000 for them?

A. I said I would hate to give \$20,000.

Q. You meant for the band as a whole?

A. That's right.

Q. Where were the sheep located?

A. On pasture, I suppose a mile or two miles from the yards there.

Q. They were out on range?

A. Yes, they were on grass.

Q. And in charge of a herder?

A. That's right.

Q. When you looked at them, I assume they were scattered all over the hillside grazing?

A. That's right.

Q. I think we understand the price per pair of these ewes and [62] lambs to be \$28. What do you

(Testimony of Jack Thomas.)

consider to be the price of the lambs from that value per pair?

A. Well, those lambs should go anyway 12 or 13 bucks, maybe 14.

Q. When you say gross that, you mean at the selling time in the fall?

A. Well, of course, when you run sheep, you might as well have the lambs, you are paying for them.

Q. When you say that, it isn't in the spring, it is in the fall?

A. It don't cost anything to run them.

Q. On May 31, 1949, when first delivered at Wickes, rather, would that lamb have a value separate and distinct from that of the ewe at that particular time? A. Absolutely.

Q. Does that lamb, at that time, have a market separate from that ewe?

A. Not at that time.

Q. A month-old lamb has value only as attached to a mother?

A. Yes, but you run the ewe all year to get the lamb. That is what you run ewes for is to have lambs.

Q. And to produce wool? A. That's right.

Q. Can you assess, as of May 31st, now, a proportion of that \$28.00 figure that goes to the lamb as of that date, not when [63] you sold it in the fall as a fat lamb?

A. I would say the lamb would be worth just as much then as in the fall. If you run ewes and

(Testimony of Jack Thomas.)

didn't get lambs, you wouldn't run ewes; you couldn't do it.

Q. Would you run the lamb without any cost?

A. That's right; if you have ewes there, it wouldn't cost you anything.

Q. So, you assess the value of that lamb at nearly fifty per cent of the ewe?

A. That's right.

Q. Of course, you intend usually to keep the ewe over and breed her again?

A. Usually, yes.

Q. At the time the sheep were shipped up there at Kevin, they were in the yards prior to the loading. Could you tell us the condition of the yard?

A. The yard was in good shape. Of course, it was the usual Great Northern Stockyard.

Q. Were they absolutely clean and not muddy?

A. As I remember, they were in good shape.

Q. Any mud in the yard?

A. Not to my knowledge; I don't remember there being any.

Q. You had been on the premises up there with Mr. Potter at the time you purchased the sheep?

A. That's right. [64]

Q. Was that country over there where the Potter ranch is located, is that alkali country, sod country, gravel territory, what is it?

A. That I wouldn't want to answer. Just grazing country is what it is.

Q. Any alkali in that country?

(Testimony of Jack Thomas.)

A. I wouldn't say; I didn't pay any attention to that.

Q. If bucks are loaded in a deck on a car, will they fight at times?

A. Not at that time of year; I don't think they would anyway.

Q. Of this bunch of sheep, Mr. Thomas, were any ewes which had not been lambbed?

A. Yes, there was a few, very few.

Q. The lambs were still to come?

A. That's right, a few of them.

Q. Can you tell us approximately how many?

A. No, I couldn't.

Q. Could you give us an estimate?

A. Maybe five per cent.

Q. Five per cent?

A. I doubt if there was that many, but that might be close.

Q. As I understand it from your testimony throughout, when the sheep were loaded, they had sufficiently dried out to be in good condition for loading?

A. That is one thing I am definitely sure of. [65]

Q. What would, in your opinion, be the effect of this: Assume they were loaded dry and proceeded through rainy weather which occasioned the cars and sheep to become wet. If that be true, and they continued through approximately 20 hours in a wet condition, would that cause the ewe to lose the scent of the lamb and vice versa?

(Testimony of Jack Thomas.)

A. I don't think so, not that. I think they would have to jam around a little.

Q. Is it possible?

A. It would be possible, but I don't think too much.

Q. When sheep are being transported by railroad, do they stand up all the time?

A. Yes, they usually do, yes.

Q. When cars are sitting quietly, not moving, do sheep stand on their feet all the time?

A. Normally you will find sheep standing up.

Q. Is it a fact sheep do lie down in cars?

A. Occasionally, yes.

Q. One thing I think you mentioned and I didn't catch it, did you say you had a mortgage on the sheep?

A. I did.

Q. You were interested in them?

A. I just had a mortgage. George owed me some money on the sheep. It was recorded down in the county. That is the only interest I had. [66]

Q. It was a purchase money mortgage between you and Mr. Melton?

A. What do you mean by purchase money mortgage?

Q. He had purchased the sheep from you and given you the mortgage as security.

A. That's right.

Mr. Gough: That's all.

(Testimony of Jack Thomas.)

Redirect Examination

By Mr. Schulz:

Q. You said five per cent of the ewes didn't have lambs. Do I understand by that they were still to lamb out, or were they dry ewes?

A. They were still to lamb out.

Q. Were there dry ewes in the band as well?

A. Of course, you are bound to have a few of them in there. There wasn't too many to my knowledge.

Mr. Schulz: That is all.

(Witness excused.)

ROBERT H. MELTON

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Schulz:

Q. State your name, please? [67]

A. Robert H. Melton.

Q. Are you related to the plaintiff, George Melton?

A. Yes, sir, he is my father.

Q. Where do you reside, Mr. Melton?

A. I reside at Wickes, Montana.

Q. How long have you lived there?

A. About two and a half years.

Q. What is your occupation?

(Testimony of Robert H. Melton.)

A. I am learning the stock business from my father.

Q. How long have you been engaged in the stock business?

A. About three years; then I have helped during my time off from school.

Q. You assisted your father in the sheep operations? A. Sheep growing.

Q. Where were you on May 31, 1949?

A. At Wickes, Montana.

Q. What were you doing there?

A. I was waiting to help unload these ewes.

Q. Were you present when the sheep arrived?

A. Yes, sir.

Q. About what time of the day did the sheep arrive at Wickes?

A. I think around ten o'clock.

Q. In the morning?

A. In the morning. [68]

Q. What was done after the sheep arrived by you and your father?

A. Well, we were there, and the train pulled up and moved the stock cars over on the siding.

Q. Were the cars spotted?

A. No, they were dropped into the siding at Wickes, and the main part of the train went on to Butte.

Q. Did you observe the condition of the sheep in the cars after their arrival? A. Yes, sir.

Q. What was that condition?

A. They were down badly in the ends of the

(Testimony of Robert H. Melton.)

cars; they were awful wet; they were scrambled, and we couldn't get into the cars at the time there to do any good to help them.

Q. Did you thereafter get into the cars?

A. As soon as they were over, we unloaded one deck of bucks.

Q. Was that deck of bucks put at the loading chute?

A. No, it was spotted above the loading chute, by the ore unloading docks, and there is a raise between the dock or docks. There is an ore unloading dock there.

Q. Were those bucks unloaded from the upper or lower deck? A. Lower deck.

Q. In addition to the bucks which you were able to load, were you able to unload any other sheep?

A. One deck that was at the loading chute, not directly there, [69] but we managed to unload them.

Q. One deck of ewes you were able to unload?

A. Yes.

Q. Were you able to spot any of those cars by hand?

A. No, it is too steep a grade there, and you can't move them without a binder.

Q. Do you require power to move them?

A. You require power to move them.

Q. How long after the cars were put there on the siding was it until the power arrived to spot the cars for you?

A. I would say an hour or an hour and a half.

(Testimony of Robert H. Melton.)

Q. When did you first get into the cars, if you did?

A. Just as soon as they were on the siding off the main line.

Q. What did you discover when you got inside of the cars?

A. The first thing, they were all in one end. They were down bad, and the cars were awful muddy, and the wool was torn from a lot of the ewes laying down in the cars, and I tried to get them on their feet and to push the ewes around, I tried to straighten them out so they would have a better chance to live. They were still getting tromped when standing there at the siding.

Q. Did you discover any dead ones?

A. Yes, there were dead sheep.

Q. How many?

A. I think three or four ewes and three or four lambs throughout [70] the cars.

Q. What about the bucks?

A. Bucks? There were two.

Q. Two dead?

A. Two dead bucks.

Q. What was done with the sheep after you unloaded them?

A. We moved them into the field that adjoins the railroad yards there.

Q. How long were they kept there?

A. Four or five days we kept them there.

Q. What was the condition of the sheep while they were kept in the pasture alongside of the railroad?

(Testimony of Robert H. Melton.)

A. They were in bad shape, the ones that had been injured. We couldn't very well move the band because to move the band, you would take all your—you would have to leave a lamb that was hurt back there. We had to move them after when we got the next shipment.

Q. Did you have any further death loss while the sheep were in the pasture? A. Yes.

Q. Do you recall how many?

A. No, I don't recall how many now.

Q. Did you see the sheep frequently after that throughout the course of the summer?

A. Yes, sir, I visited the sheep camp about every three days. [71]

Q. You saw this particular band of sheep every three days? A. Yes, sir.

Q. That is true until the time the sheep were sold that fall? A. Yes, sir.

Q. You heard your father testify this morning as to the loss in this band of sheep?

A. Yes, sir.

Q. What, in your opinion, was the cause of that loss?

A. Well, I think the cause of that loss was due to the handling of the ewes and the condition they were in, and some weren't in fit condition to have lambs with them, and they refused their lambs; the lambs couldn't go with their mothers, the ones that were hurt.

Q. This condition they were in. What time, now, are you referring to?

(Testimony of Robert H. Melton.)

A. After we unloaded them there.

Q. At Wickes? A. At Wickes.

Q. Did anything of an unusual nature occur, Mr. Melton, throughout the summer that would have caused an unusual loss such as your father has testified to? A. No.

Mr. Schulz: You may examine. [72]

Cross-Examination

By Mr. Gough:

Q. Mr. Melton, you had never seen the sheep prior to their arrival at Wickes, is that right?

A. No, sir.

Q. When the sheep cars were first spotted on the siding, and prior to the time the local arrived to unload them, did you get in those cars?

A. Yes, sir, I did.

Q. Did you get into each one of the right cars?

A. I got into the cars that we could help, and then I crawled into one car at the end where they were down badly and tried to help in there, but it is almost impossible unless you can get the bigger ewes upon their feet out because of the limited space in there. Working and trying to pull a ewe around is a pretty good job to do it.

Q. When you got in there, did you feel the sheep?

A. I was crawling on my hands and knees.

Q. If you tried to boost up those ewes, you had to use your hands? A. Yes.

Q. Were the sheep wet? A. Yes, sir.

(Testimony of Robert H. Melton.)

Q. Would you say they were very wet?

A. I would, yes. [73]

Q. I think you said some of them apparently were injured, crippled? A. Yes, sir.

Q. Were those injuries such as would be cuts in the wool or in the flesh? A. Yes, sir.

Q. Their skin would be scraped?

A. The wool had been peeled from the hide by the sections of the hooves, making a gash across it, just pulling the wool off.

Q. On the lower leg bone where the wool goes down, were there any cuts or scratches present, bruises?

A. I can't remember that on the lower part of the legs. There were some on the stomachs and parts where the wool is heavier than on the legs.

Q. I believe you stated some of those sheep, at least, were lying down?

A. They were in the end of the car, yes, sir.

Q. It is your opinion, as I understand it, Mr. Melton, that the cause of the loss to this band was due to the condition of the sheep at the time they arrived at Wickes? A. Yes, sir.

Q. You don't know the exact cause of that condition, do you? A. No, sir.

Q. The sheep that were dead at the time of their arrival at Wickes, I believe you stated, were three ewes, three lambs, and [74] two bucks?

A. Somewhere around there.

Q. They were scattered through eight cars?

A. Yes, sir.

(Testimony of Robert H. Melton.)

Q. I believe you heard Mr. Thomas testify there were about five per cent of this band had not lambed. Were the ewes which were still to lamb segregated at all?

A. I don't know that; I wasn't there when they loaded the sheep.

Q. But you were when they were unloaded?

A. Yes, sir.

Q. Were those ewes still to lamb, did you notice whether they were segregated?

A. That is pretty hard to tell, isn't it? If a sheep is rolled in the mud, she looks like another ewe. The only way I could tell she hadn't lambed would be to look at her bag.

Q. Could you see their bags?

A. Not crawling around in the car, I couldn't. I wasn't looking for that.

Q. Which end of the cars were these sheep piled in?

A. The north end at Wickes.

Q. That would be the end pointing toward Helena and Great Falls, wouldn't it?

A. Yes, sir.

Q. When you moved the band out from the yard there where you [75] kept it, they trailed right on out to the pasture?

A. From the stockyards?

Q. Yes.

A. Yes.

Q. Then you took them onto the range. Where did you first put them.

A. Right in the pasture.

Q. Then turned them right out on the range?

A. Yes, sir.

Mr. Gough: That is all.

Mr. Maury: We rest.

(Witness excused.)

Court: Call the first witness for the defense.

W. H. PORTER

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Gough:

Q. State your name, please, sir?

A. W. H. Porter.

Q. Where do you now reside, Mr. Porter?

A. Butte, Montana.

Q. Are you an employee of the Great Northern Railway Company? [76]

A. Yes.

Q. How long have you been an employee of them?

A. 37 years.

Q. Are you an agent-telegrapher?

A. Yes, sir.

Q. On May 30 and 31, 1949, were you an agent for the Great Northern Railway Company at Kevin, Montana?

A. Yes, sir.

Q. Had you been agent there for some time previous?

A. Yes, sir.

Q. About how long, just approximately?

A. A year.

Q. Are you familiar with the loading of eight car loads of sheep by Mr. Melton and Mr. Thomas on May 30, 1949, at Kevin, Montana?

(Testimony of W. H. Porter.)

A. Yes.

Q. Previous to the loading of these sheep on May 30, 1949, had a car order been placed by the shippers for the cars?

A. In this particular case, car orders were placed with the car distributor in Great Falls.

Q. When did the cars arrive at Kevin for the loading of those sheep?

A. I'll look at my tally book here. The day before that day.

Q. You have referred to consulting the book. What is the [77] book?

A. The station agent keeps a daily yard check form 373, made of the cars on the track at their station each day.

Q. Just a minute, now. The book to which you refer, form 373, at which you are now looking, was that kept by you while you were agent at Kevin, Montana?

A. Yes, sir.

Q. Are the entries which appear therein made in your handwriting?

A. They are.

Q. You are now refreshing your recollection by looking at that, is that true?

A. Right.

Q. Now, can you tell us when those cars arrived?

A. They first appear in the yard check on the 29th. It is possible they could have been received the day before.

Q. So, they were there at least one day prior to loading?

A. Yes.

(Testimony of W. H. Porter.)

Q. Where were they placed in the yard at that time?

A. On the industrial track, the east car spotted at the double-deck chute.

Q. Was that car so spotted that loading could be accomplished without any movement of the car?

A. Yes, sir.

Q. Now, referring to the day of May 30, 1949, in the morning [78] of that day, you anticipated these sheep would be coming in for loading?

A. Yes, sir.

Q. When did you first see the sheep?

A. The bucks were in the yard when I arrived in the yard approximately nine o'clock on May 30th.

Q. When you speak of the bucks, you mean the bucks were in the pens there? A. Yes.

Q. Were any ewes and lambs there?

A. Not at that time.

Q. Now, was there anyone with these bucks?

A. No one in the yards at the time I got there.

Q. Were either Mr. Melton or Mr. Thomas present then?

A. Not at that time. If I am not mistaken, as I remember, Sam Potter came to the station about nine o'clock asking if Mr. Melton and Mr. Thomas had shown up.

Q. Now, you have been here present in the courtroom and heard Mr. Melton and Mr. Thomas testify, have you not? A. Yes.

Q. You have seen them? A. Yes, sir.

(Testimony of W. H. Porter.)

Q. Now, about that time, between nine and 9:30, was it raining at Kevin?

A. Yes, it was. [79]

Q. Now, at that time, did you have occasion to weigh any sheep?

A. Yes, upon my arrival at the stockyards, I found the bucks, and in order to put the scales in order for weighing, I opened the door and closed the gates and I ran nine bucks on the scales and weighed them. The nine bucks actually weighed 1820 pounds.

Q. You just took the first nine bucks that came along?

A. I would say I did.

Q. Was anybody else present?

A. Not at that time. As I remember, help was pretty scarce that day.

Q. Did you stay in the stockyards with the sheep?

A. Yes, I stayed at the stockyards until Mr. Melton and Mr. Thomas arrived in the yards with a car.

Q. About what time was that, do you remember?

A. It was 9:55 a.m.

Q. At the time Mr. Melton and Mr. Thomas arrived, were there any ewes and lambs in the yards. There were just the bucks alone?

A. That's right.

Q. Did they commence to load the bucks upon their arrival?

A. No, not at that time.

(Testimony of W. H. Porter.)

Q. When were the first sheep loaded, either bucks or ewes? A. 10:40 a.m. [80]

Q. Now, at 10:40 a.m., had the ewes and lambs arrived at the yard?

A. They were pretty close to the yards at 10:40 a.m. I would say within a quarter mile.

Q. At 10:40, they commenced loading bucks, is that right? A. That's right.

Q. After the completion of the loading of the bucks, did they continue loading ewes and lambs?

A. There was a lull during that time, which appeared to be—it was necessary for me to stay at the gates. I had no help, only the Potter sheepherder, and in order to have the gates ready when the ewes and the lambs came up the chute, it was necessary for me to stay there. As I could see it, they were counting out the number of ewes that they wanted to load in this upper deck of the first car, 53923.

Q. It is not necessary to give that. You say there was a lull in the loading after loading the deck of bucks and before the ewes and lambs came in, is that correct?

A. Yes, I would say they were close to the yard, and they were in a large pen, and they were counting them, bringing them to the loading gate.

Q. Did they continue to load ewes and lambs, filling the decks of the various cars?

A. That's right, the upper deck.

Q. Was there any lull in the loading or any

(Testimony of W. H. Porter.)

period during [81] which any loading did not occur after they started to load ewes and lambs?

A. Well, yes, after the three cars were loaded.

Q. You stated "the three cars." Just what three cars?

A. I am talking—the first car contained bucks and also ewes and lambs, then there was no lull until the third car was loaded; I mean they loaded three cars, and about 12:20, they decided to go to lunch.

Q. About 12:20? A. Correct.

Q. So there were three cars loaded?

A. That's right.

Q. Did you, at that time, have any knowledge or any idea that they would load any more sheep?

A. Well, at 12:20, yes; at 12:20 I did, but not at 10:40 a.m. It was decided they would only load three cars because of the weather conditions, but at 12:20, it was not raining and they went to lunch, and it was decided they would load more cars later on, weather permitting.

Q. You say, "it was decided." I assume Mr. Melton or Mr. Thomas told you that?

A. That's right.

Q. Do you know—you have stated it was raining at Kevin in the morning. Do you know how long the rain continued?

A. Yes, it rained up until, drizzled intermittently and rained [82] throughout the morning according to my records. That is, I mean up until 10:40.

Q. Then, there was a stop in the raining condition? A. Yes, that's right, at 10:40.

(Testimony of W. H. Porter.)

Q. How long did the cessation of the rain take place; when did it start to rain again?

A. Again at 1:55 p.m. At that time, there was approximately five cars loaded.

Q. When did the complete loading of these sheep take place? A. At three p.m.

Q. So there was approximately the last hour of the loading that the sheep were being rained on again? A. Yes, a very light rain.

Q. A drizzle? A. Yes, a drizzling rain.

Q. Now, at the time of the loading, Mr. Porter, did you notice the condition of the stockyards there?

A. Well, they would naturally be wet. It had been raining for about four or five hours.

Q. They had incidental mud and muck along with that?

Mr. Maury: Objected to as leading.

Mr. Gough: I will withdraw the question.

Q. Was there any mud in the yards?

Mr. Maury: Objected to as leading.

Court: Yes, it is leading, but there is no use taking [83] up the afternoon about that.

Mr. Gough: I am leading the witness, your Honor, trying to hasten the case along since there is no jury present.

Q. Was there mud in those yards?

A. Personally, I wasn't in the yard itself. I was quite busy preparing to load stock. I was not

(Testimony of W. H. Porter.)

in the yards. The sheep were dirty, and naturally, they had been in mud to be dirty.

Q. As you noticed the sheep being loaded, were they wet?

A. Yes, they were wet; I wouldn't say they were dry by any means.

Q. Were you standing at the loading gate on the chute as the sheep were loaded? A. Yes.

Q. Did you watch all the sheep being loaded?

A. No, the last two cars I wasn't there; I was called to the station for other duties.

Q. Do you remember, Mr. Porter, when the train arrived in Kevin that day?

A. The record shows ten o'clock a.m.

Q. Was that train there present from that time until the completion of the loading?

A. Yes, sir.

Q. And handled the loading and moving of the cars as required? [84] A. Yes, sir.

Q. What type of cars were they, Mr. Porter?

A. They were all 36-foot, double decked Great Northern stock cars.

Q. They had been sanded and were in condition for shipping? A. Yes, sir.

Court: Had been what?

Mr. Gough: Sanded.

Q. Now, at any time during the shipping, did you remonstrate with any of the shippers about any particular car and the method in which it was loaded?

A. My records show that I remarked to Mr.

(Testimony of W. H. Porter.)

Melton about the first car that was loaded with 70 bucks in the lower deck, and then there was—or rather 74 in the lower deck, and 70 ewes and what lambs could get behind or fall in with them. In my opinion, the car was overloaded, but my records show they insisted there was plenty of room, and that we closed the car.

Q. Did you base your opinion on the overloading of the car on the weighing you had done previous to this time?

A. An agent usually, after the stock is pretty well settled down, can tell if there is room for them, and that is one reason I weighed the nine bucks, to determine as to just how many could be loaded to the capacity of the car.

Q. Now, during the loading operation, did any conversation take place between yourself and either Mr. Thomas or Mr. Melton [85] regarding the advisability of loading these sheep?

A. My record shows here that while I had the pleasure of sitting in the car with Mr. Thomas that he remarked, this is at 10:30, "If the rain continues, we will only load the car with the bucks and one other car and trailer."

Q. That was during the earlier part of the morning?

A. That was 10:30 a.m. It was very comfortable in the car.

Q Mr. Porter, you have referred to your record, and do you have in your possession the original stock loading record of Kevin on May 30, 1949?

(Testimony of W. H. Porter.)

A. I have the original duplicate. The original is forwarded to the superintendent's office the following day, May 31st.

Q. You have in your possession the original duplicate of that record, rather? A. Yes, sir.

Q. Was that prepared by you?

A. Yes, sir.

Q. What day did you prepare it?

A. May 30th.

Q. That is a typewritten record, is it not?

A. It is.

Q. It was typed by you? A. It was.

Q. Handing you now what has been marked for identification, Defendant's Exhibit 5, I will ask you to identify that again [86] as the stock loading record about which you have previously testified? That is it, isn't it? A. It is, yes.

Mr. Gough: I offer in evidence Defendant's Exhibit 5.

Mr. Schulz: To the defendant's offer of number 5, the plaintiff objects upon the ground and for the reason it appears therefrom—— (Interrupted.)

Court: Let me see the exhibit. Proceed, Mr. Schulz.

Mr. Schulz: It is a self-serving declaration; two, it is based substantially upon hearsay; three, that the witness pretends to be an expert upon what is a proper load, in other words, there is no proper foundation laid; four, it does not tend to prove or disprove any issue in this case.

Court: Well, of course, the statement of the

(Testimony of W. H. Porter.)

witness, or the statement on the record that the car was—"informed shipper that this car was overloaded" doesn't establish that the car was overloaded, that is true, but it is the record kept. Do you base any objection on its being a stock loading record of the company made at the time.

Mr. Schulz: No, your Honor. We do object to the content. For instance, he states here, "Sheep had been trailed for 8 miles that morning through the rain." Clearly this witness hasn't established that he knows that fact.

Court: Well those matters can be settled. I will overrule the objection. The effect of it, you can determine by [87] further evidence on cross-examination of the witness as to what the record discloses.

(Defendant's Exhibit 5, being Stock Loading Record, Dated May 30, 1949, at Kevin, Montana, was here received in evidence and will be certified to the Court of Appeals by the Clerk of the above Court.)

Q. Handing you what has been marked Defendant's Exhibit 5, I will ask you to refer to that and state does that record show the loading of these sheep started at 10:40 a.m.

A. You refer to the three cars?

Q. To all the cars.

Mr. Maury: We object, the record itself is the best evidence. He doesn't need to say what it states.

Court: Sustained.

Q. Now, did we cover this: the train was there at ten o'clock, was it not? A. Yes.

(Testimony of W. H. Porter.)

Q. When did it depart? A. 3:30 p.m.

Q. Loading was completed at three?

A. Yes.

Q. Are you familiar with the location of the Potter sheep ranch outside of Kevin?

A. I would say I was not other than just passing by on the dirt road. I have been out there, but I have never been to the ranch itself. [88]

Q. You haven't been to the ranch?

A. No. I have been as far as Aloe. It is six and a quarter miles from Kevin. His ranch adjoins that.

Q. Was the trail or road between the Potter ranch and Kevin, Montana, was it gravel or hard-top, or what?

A. It was just a regular dirt road.

Mr. Gough: That is all.

Cross-Examination

By Mr. Maury:

Q. When did you last see Sam Potter?

A. About August 25, 1949.

Q. You haven't seen him since? A. No.

Q. You don't know if he is in Kevin now or not? A. No.

Q. Were you transferred from Kevin in August, 1949? A. That's right.

Q. It was part of your duties to sign way bills, was it not? A. Yes, sir.

Q. And this is your signature on the way bill?

A. Yes, sir.

(Testimony of W. H. Porter.)

Q. Exhibit 1, and your signature on way bill, Exhibit 2? A. Yes, sir.

Q. They were signed there that day? [89]

A. Yes, sir.

Q. The same day the sheep were loaded?

A. Yes, sir.

Q. And each of those way bills recited that the sheep were in apparent good condition, did they not? A. Yes, sir.

Q. And that was over your signature?

A. Yes, sir.

Mr. Maury: That is all.

(Witness excused.)

J. R. McCLELLAND

called as a witness on behalf of the defendant,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Gough:

Q. State your name, please?

A. J. R. McClelland.

Q. Where do you reside, sir?

A. Great Falls, Montana.

Q. Are you employed by the Great Northern?

A. Yes, sir.

Q. In what capacity?

A. Chief dispatcher.

Q. You mean on the Butte Division of the Great Northern? [90] A. Yes, sir.

(Testimony of J. R. McClelland.)

Q. Does the Butte Division include those lines of railroad running south from Kevin to Shelby, Montana, to Great Falls, Montana, and then south on the Butte line to Wickes? A. Yes, sir.

Q. Were you chief dispatcher on May 30 and 31, 1949? A. Yes, sir.

Q. And as part of your duties as chief dispatcher on this division, would you be in charge of and supervising over train dispatching?

A. Yes, sir.

Q. Are you the one that is charged with the responsibility of keeping train sheets?

A. Yes, sir.

Q. I hand you what has been marked for identification as Defendant's Exhibit No. 6, and will ask you to explain what that is?

A. That is the train sheet covering the movement of trains between Sweetgrass to Great Falls; also on the line from Havre to Great Falls. It shows the movement of passenger trains and freight trains, and also carries information regarding weather, accidents, and so on and so forth, pertaining to the movement of trains.

Q. What is the date of that?

A. May 30, 1949. [91]

Q. I call your attention to the signatures that appear of the dispatcher on duty on the 24-hour period of that date. Do you recognize and know that those are dispatchers?

A. Those are dispatchers, J. B. Goodman, mid-

(Testimony of J. R. McClelland.)

night to 8; D. J. Evans, from 8 to 4 p.m.; and R. M. Harris, 4 p.m. to midnight.

Q. Does the train sheet show all trains operating from Kevin to Great Falls on that day, May 30th? A. Yes, sir.

Q. This record has been kept under your personal supervision and in your custody, has it not?

A. Yes.

Mr. Gough: I offer in evidence Defendant's Exhibit 6.

Mr. Maury: I suggest counsel can properly segregate what he wants in this record and offer it separately. As to the way these records are kept, they are usually kept with the ordinary degree of accuracy. I don't think the Court can read one of them. I know I can't read one of them, but a professional can read them.

Court: What information do you have there that you want?

Mr. Gough: On this train sheet is the absolute record of this train from Kevin to Shelby and Shelby to Great Falls.

Court: Is that what you want?

Mr. Gough: Yes.

Court: Have him read it and counsel can object to it.

Mr. Gough: Your Honor, there is good deal of authorities [92] to back up train sheets in evidence. They are exceptions to the general rule. They are admitted as being permanent records of the railroad.

(Testimony of J. R. McClelland.)

Court: For the purpose of showing train movements?

Mr. Gough: And the evidence and all incidents, the happenings and the train movements as shown on the train schedule.

Mr. Maury: I don't think they could introduce the train record to show that they did not eject a passenger at a certain station.

Court: Of course, that is not the purpose. They are not introducing it to prove it didn't happen.

Mr. Maury: I don't think they could introduce the train record to show a passenger did not pay his fare.

Court: No, it is not exclusive.

Mr. Maury: These other matters, weather conditions, are just hearsay so far as this trial is concerned.

Court: You say your authority sustains the introduction of the train record to show what weather conditions are?

Mr. Gough: No, no I don't say it just for weather conditions.

Mr. Maury: Mr. Gough, to save you putting all this in that we can't read, have the dispatcher here read what is relevant to this case, and then the court can give us permission to make an objection after he has read that. [93]

Court: Very well.

Mr. Maury: That thing wouldn't mean anything to us, but does mean a lot to the dispatcher.

Court: Very well, from that, tell us what the

(Testimony of J. R. McClelland.)

record shows with reference to the train on which the eight cars of sheep were carried.

Q. (By Mr. Gough): Mr. McClelland, looking at the train sheet for May 30, 1949, will you tell us from that the government of the eight car loads of sheep from Kevin, Montana, that date until their arrival at Great Falls on the same date?

A. Eight cars of sheep loaded at Kevin, Montana; loading completed at 3:30 p.m., May 30th, by train that arrived at Kevin at 10 a.m. on this date; departed from Kevin at 3:50 p.m. on this date, arriving at Shelby, Montana, at 4:45 p.m. It shows 10 loads and eight empties, 800 tons, in this train arriving at Shelby. The eight cars of sheep were then transferred to a train leaving Shelby at 6:30 p.m., arriving at Great Falls, Montana, 12:45 a.m., May 31st. In this train, they had eight loads and five empties, 365 tons. The eight loads were the eight cars of sheep.

Q. Now, Mr. McClelland—— (Interrupted.)

Mr. Maury: May I find out, is that all in that record that pertains to this train?

Q. Mr. McClelland, on this train sheet, is there a record of the reports of weather conditions existing on this portion [94] of the division over this period of time?

Mr. Maury: As to this, we want time to object.

Court: Very well.

A. Yes, there is records of the weather over the division.

Q. Will you tell us what this record shows as

(Testimony of J. R. McClelland.)

regards the condition of the weather during that time on that train?

A. Medium rain, cloudy, raining light, light west wind.

Court: It is not a question of what you would say it was, what does the record say.

Q. You will have to read it from the record.

A. I will have to ask this: Do you want any particular spot?

Q. The weather condition, as it applies to the train in which we are interested, from Kevin to Great Falls only.

A. Cloudy to light rain, calm, light west wind.

Q. What point are you talking about?

A. I am taking it from Shelby to Great Falls. That is what you want, isn't it?

Q. Yes.

A. It runs cloudy to light rain, temperature 65 to 64 above, calm to light west winds.

Q. That is for the movement between Shelby and Great Falls?

A. That's right.

Mr. Gough: I renew the offer.

Mr. Maury: As to that part of this record that the witness [95] has testified to, we have no objection.

Court: Very well, that portion of the record is admitted, and then counsel can take the record back. You need all of them?

Mr. Gough: They are permanent records, and we are not allowed to destroy them.

Court: They wouldn't be destroyed here.

(Testimony of J. R. McClelland.)

Mr. Gough: How would it be if we took it, your Honor. We could substitute a copy.

Court: Yes, if you substitute a copy just with reference to this train.

(Defendant's Exhibit 6, being Dispatcher's Record of Movement of Trains, Butte Division, Great Northern Railway Co., dated Great Falls, Montana, Monday, May 30, 1949, here received in evidence, will be certified to the Court of Appeals by the Clerk of the above Court.)

Q. Now, Mr. McClelland, referring to the train from Kevin to Shelby, was that what we call a large tonnage train or a small tonnage train?

A. Kevin to Sheby? That is a small tonnage train.

Q. Referring now to the train between Sheby and Great Falls that had eight loads and five empties?

A. Very small tonnage. It had 365 tons compared to the 3000 tons which it was capable of handling.

Q. Referring to the train movement, Shelby to Great Falls, what were the loads in that [96] train? A. Eight cars of sheep.

Q. No other loads in the train?

A. No other loads in the train.

Q. Was that a special movement?

A. Yes, I would consider that a special movement.

Q. You are the chief dispatcher who arranges

(Testimony of J. R. McClelland.)

train schedules on this portion of the Butte Division, are you not? A. Yes, sir.

Q. Had you originally set up a plan for the movement of the sheep prior to May 30, 1949?

A. Yes, sir.

Q. Tell us what that plan was?

Court: What difference does that make?

Mr. Gough: The materiality of that is we held a local train at Kevin for loading sheep from 10:30 in the morning to 4:30 in the afternoon. We were doing the best we could for them.

Court: Whether you were doing the best you could or not, I don't think that is material. They were loaded at a particular time, and they came through.

Mr. Gough: All right.

Q. Mr. McClelland, I'll hand you what has been identified as Defendant's Exhibit 7, and ask you what that is?

A. That is a train sheet of May 31st, showing the movement of trains between Great Falls and Butte, and also between Great [97] Falls and Billings and Laurel.

Q. Does that train sheet show on it the movement of the eight car loads of sheep involved in this action from Great Falls to Wickes?

A. Yes, sir.

Q. Tell us when that left Great Falls?

A. Departed from Great Falls on Extra 306, 4:55 a.m.

Q. The morning of May 31st?

(Testimony of J. R. McClelland.)

A. May 31st; arrived at Wickes approximately 10:30 a.m.

Q. The same morning.

A. The same morning.

Q. Does that train sheet also indicate the movements of the local train which unloaded these sheep?

A. Yes, sir.

Q. Will you tell us where that train started, and its arrival at Wickes?

A. The train started at Butte, 9:20 a.m., and met the extra west that set the sheep out at Wickes at Boulder at 11:25 a.m., and was over at Wickes approximately 11:50 or 55 a.m.

Q. This train sheet was also kept under your supervision and control, and you are responsible for it?

A. Yes, sir.

Q. Does it show on this train sheet weather conditions?

A. Yes, sir.

Mr. Maury: As to this journey, may we reserve objection [98] on it until we hear it?

Court: Yes.

Q. Referring only to the movement of the sheep involved from Great Falls south to Wickes, will you state what the record shows as regards to weather?

A. It shows light rain all night long and intermittent showers all day long on the Butte line, which would be this territory, and temperature 47 to 54 above.

Mr. Gough: I will offer in evidence Defendant's proposed Exhibit 7.

(Testimony of J. R. McClelland.)

Mr. Maury: No objection to what has been read here.

Court: Very well, it may be admitted, and you can substitute a copy.

(Defendant's Exhibit 7, being Dispatcher's Record of Movement of Trains, Butte Division, Great Northern Railway Co., dated Great Falls, Montana, Tuesday, May 31, 1949, here received in evidence, will be certified to the Court of Appeals by the Clerk of the above Court.)

Q. Referring once more to the record, can you tell us the type train that carried the sheep from Great Falls to Wickes, I should say the class of train?

A. That train was what we call a time train, or a through freight that handles the through business from Great Falls to Butte, ordinarily making one set out at Helena, but does no local work ordinarily.

Q. Was that a large train that day? [99]

A. No, that train had about two-thirds of its tonnage.

Mr. Gough: That is all on that.

(10-minute recess.)

Q. Now, Mr. McClelland, referring again to the train sheets in evidence, do these sheets show the conductors handling the trains involved in this movement?

A. Yes, sir.

Q. Was conductor Veach the one who handled the train from Kevin to Shelby?

A. Yes, sir.

(Testimony of J. R. McClelland.)

Q. Conductor Larson from Shelby to Great Falls? A. Yes, sir.

Q. Conductor Marceau from Great Falls to Wickes? A. Yes, sir.

Q. And Conductor Ewinski handled the unloading of the sheep at Wickes? A. Yes, sir.

Q. In the course of railroad operations, is it required that the conductors on trains keep what we call a wheel report? A. Yes, sir.

Q. Will you explain what the wheel report is?

A. A wheel report is a report that shows the cars handled, the loads and empties handled in the train, where they are picked up, what they contain, and where delivered.

Q. Is it also required that the conductor of a train keep and [100] file what is known as a delay report? A. Yes, sir.

Q. Tell us what that is?

A. A delay report is made out by the conductor giving the information on the engine and engineer and the delays encountered, such as switching and meeting trains in different stations, a complete record of that from the time he leaves his terminal until he arrives at his terminal and ties up.

Q. Mr. McClelland, you were the man in charge of train operations on May 31, 1949, were you not?

A. Yes, sir.

Q. You have been present here in Court and heard Mr. Melton testify regarding the arrival of Number 306 at Wickes and the wait for the local?

A. Yes, sir.

(Testimony of J. R. McClelland.)

Q. Will you explain why it was necessary in normal train operations that Train No. 306 did not accomplish the unloading of the sheep?

Mr. Schulz: To which we object as not tending to prove or disprove any issues in this case.

Court: I don't see it. There is no claim of any negligence on the part of the plaintiff that that delay has anything to do with the injuries here.

Mr. Gough: I would like to hear their answer.

Mr. Schulz: It is a contributing factor. [101]

Court: If it is a contributing factor, then it is material.

Mr. Schulz: The reason for the delay—— (Interrupted.)

Court: If you claim some delay was a contributing factor, the delay at what point?

• Mr. Schulz: At Wickes.

Mr. Maury: Our contention is that when stock being transported are known to be in trouble and needing unloading, that it is the duty of the railroad company to stop that train and unload that stock wherever it may be. We will submit plenty of authority on that.

Court: Very well. The objection is overruled.

Q. Will you answer?

A. Well, this extra time train that handled the sheep to Wickes, this train had been seriously delayed at Great Falls waiting for the sheep to come from Shelby, and that train is a through freight, as I stated already, and handles our eastern connections for Butte, and we have to get this train

(Testimony of J. R. McClelland.)

to Butte as close to noon as possible to give the switch engine a chance to spot business for Butte, and also deliver business to our foreign line connections at Butte, and due to the delay this train had already encountered, and with the local train waiting at the next station to meet 306, why we let 306 set the cars out so he could proceed to Butte, and had the local unload the sheep.

Q. Now, Mr. McClelland, were you notified by any party that [102] these sheep were in bad condition and needed to be unloaded immediately?

A. No, sir.

Court: Do you want to make an objection?

Mr. Schulz: Yes.

Court: Strike the answer.

Mr. Schulz: We object to that as hearsay, this gentleman is up in Great Falls.

Court: The question was, was he notified. The objection is overruled. You may answer again.

A. No, sir.

Q. Had you been notified, would you require Train 306 to stop?

Mr. Maury: Objected to; a mental conclusion that a person might have had is not material.

Court: Sustained.

Q. In setting up your train operation, Mr. McClelland, how long do you usually calculate for the unloading of a car load of sheep?

A. 15 minutes. We use 15 minutes for a basic figure in the planning of a movement.

(Testimony of J. R. McClelland.)

Q. And you use that to make your train plans, to make your meets and passing orders?

A. Yes, sir.

Q. Can you tell us from these train sheets the length of [103] time the local train that did the unloading at Wickes was there in Wickes?

A. Not definitely. I would have to have the delay report to show that.

Mr. Gough: That is all.

Cross-Examination

By Mr. Maury:

Q. Mr. McClelland, how late was the train leaving Great Falls?

A. Approximately four hours and 45 minutes.

Q. What is the running time of that train, or what was the usual running time during the week of May 30, 1949, of that train between Great Falls and Wickes? Wickes, I didn't say Butte, I said Wickes. Can you look at the train sheet and tell us, or can you tell us from your individual recollection?

A. Oh, I would say approximately seven hours.

Q. What time was that train due in Butte, the train with the sheep?

A. You mean this particular train, after leaving late, what time should it have arrived in Butte?

Q. No. What time did the train the day before, the same train the day before, if it was on time, arrive in Butte?

(Testimony of J. R. McClelland.)

A. I can't tell without the train sheet what time, but usually at nine or ten a.m.

Q. Usually at nine or 10 a.m., and this train was at Wickes [104] at 10:30? A. Yes, sir.

Mr. Maury: That is all.

Redirect Examination

By Mr. Gough:

Q. This particular train left Great Falls, however, approximately four hours late?

A. Yes, sir.

Recross-Examination

By Mr. Maury:

Q. What was its running time to Wickes? Consult the sheet on that, I want to know exactly, from Great Falls to Wickes.

A. Approximately five hours and 35 minutes.

Q. Five hours and 35 minutes. What was its running time from Helena to Wickes on that day with these sheep?

A. Approximately one hour.

Q. How many miles is it from Helena to Wickes? You said approximately one hour. Give us exactly how much.

A. I would have to have the delay report. You see Wickes is not an open office.

Mr. Gough: We will get that, Mr. Maury, the delay report to the conductor.

Mr. Maury: It doesn't appear on the train

sheet; you don't [105] know anything about it, all right.

Court: Call the next witness.

(Witness excused.)

ROY U. VEACH

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Gough:

Q. State your name, please, sir?

A. Roy U. Veach.

Q. Where do you live, Mr. Veach?

A. Shelby, Montana.

Q. Are you a conductor of the Great Northern Railway Company? A. Yes, sir.

Q. How many years have you been in train service? A. 35.

Q. Were you a conductor for the Great Northern between Kevin and Shelby on May 30th, 1949?

A. Yes, sir.

Q. Was that Memorial Day?

A. Yes, it was.

Q. Do you remember on that day handling in your train eight carloads of sheep from Kevin, bound south towards Shelby?

A. Yes, sir. [106]

Q. I hand you what has been marked for identification as Defendant's Exhibit 8, and ask you, sir, what that is?

A. That is my delay report, May 30, 1949.

(Testimony of Roy U. Veach.)

Q. Was that prepared by you?

A. Yes, sir.

Q. Is it in your handwriting?

A. Yes, sir.

Q. Signed by you?

A. Yes, sir.

Mr. Gough: I will offer in evidence Defendant's Exhibit 8.

Mr. Maury: No objection.

Court: Very well, it is admitted.

(Defendant's Exhibit 8, being Train Delay Report, dated May 30, 1949, here received in evidence, will be certified to the Court of Appeals by the Clerk of the above Court.)

Q. Referring to Defendant's Exhibit 8, I will ask you to state, after refreshing your memory from looking at that, as to when you arrived with your train at Kevin on the morning of May 30, 1949?

A. We arrived at ten a.m.

Q. How long were you there?

A. I was there until 3:45 p.m.

Q. And from there, did you proceed to Shelby?

A. Yes, sir.

Q. How long—excuse me, when did you get to Shelby? [107]

A. 3:45.

Q. Why were you delayed at Kevin that time?

A. On account of loading the sheep.

Q. At the time you arrived with your train at Kevin, were the sheep in the yards ready to be loaded?

A. No, they weren't.

(Testimony of Roy U. Veach.)

Q. Were you there present from ten in the morning until 3:45 around the stockyards while this loading took place?

A. Yes, except the time we took out for lunch.

Q. Now, Mr. Veach, will you tell us whether or not it was raining when you arrived at Kevin about ten o'clock that morning?

A. No, it wasn't raining.

Q. Had it been raining previously?

A. Yes, it had.

Q. Did you assist in the loading of the sheep?

A. I poked them with my shoe as much as I could.

Q. Did you observe the condition of the sheep?

A. Yes, I did.

Q. Will you tell us what condition you observed?

A. I thought they were very wet. The little fellows was muddy and dirty.

Q. And, Mr. Veach, you have been a conductor for a good number of years now?

A. Yes, 35 years.

Q. Have you loaded many sheep? [108]

A. Yes, lots of them.

Q. Now, when you first arrived, were one of the stock cars spotted at the chute at Kevin?

A. Yes, it was.

Q. Was any loading taking place?

A. They hadn't started any loading yet.

Q. Did they start to load some time after that?

A. Yes, shortly after we got the engine down.

Q. When they started loading sheep, did they

(Testimony of Roy U. Veach.)

load continually until they finished the whole eight cars, or were there some lulls in the loading?

A. There was a slow-up in there. They took time to cut the sheep and sort them.

Q. During the process of the loading of these sheep, did it start to rain again?

A. It started to rain after lunch again, some time after lunch; I wouldn't know just what time.

Q. Did it rain on the sheep part of the time they were being loaded?

A. There was a light rain at that time, yes.

Q. Now, after you departed from Kevin with the sheep in your train, did you proceed, start to Shelby?

A. Yes, sir.

Q. Did anything happen to your train between Kevin and Shelby? [109]

A. No.

Q. Did you make any sudden stops?

A. Never did.

Q. Was there any rough handling?

A. Not a bit.

Q. Was there any switching?

A. No switching until we got to Shelby, and then we didn't switch the sheep. All we done was set them over.

Q. Did you notice the condition of the stock-yards in Kevin the day of May 30th?

A. Yes, I noticed the condition.

Q. What condition did you observe?

A. The two entrance pens was in very bad shape; they were very muddy. You see, they have an entrance pen on the west there, and then there

(Testimony of Roy U. Veach.)

is an entrance on the side at the middle pen, I think it is.

Q. When you picked the sheep up in your train, where in the train were the sheep located?

A. Right behind the engine.

Q. Did you inspect the train after you arrived at Shelby? A. Yes, I did.

Q. By "inspecting the train," what do we mean?

A. You look at your train as you go down along; anything like open cars we would see, or your running gear of your train, such matters. [110]

Q. At that time in Shelby, after you arrived there, did you observe these eight cars of sheep?

A. Yes, I did.

Q. What did you observe about them then?

A. I noticed a lot of little lambs laying down. They wasn't much larger than jack rabbits, they didn't look to me then.

Q. Were any sheep piled up in the cars? Were they piled up at either end of the cars?

A. No, they weren't.

Q. Was there anything that made you think there was anything wrong with the sheep?

A. No, I couldn't see anything wrong with them outside of being wet.

Q. So far as you know, when you last observed them, the sheep were in good condition?

A. Yes.

Q. Mr. Thomas and Mr. Melton, who shipped these sheep, do you know them?

A. Do I know them?

(Testimony of Roy U. Veach.)

Q. Do you know them by sight?

A. Yes, I know them by sight. I just had met Mr. Thomas.

Q. During the loading of the sheep, was Mr. Melton in charge of the loading operations?

A. Yes, he was down in the yard.

Q. He was boss of the deal? [111]

A. Yes.

Mr. Gough: You may cross-examine. Your Honor, I marked an exhibit for identification and didn't use it.

The Court: If it isn't material, we don't want it.

Cross-Examination

By Mr. Schulz:

Q. Mr. Veach, how long a time did you have the sheep in your custody?

A. In my custody? I had them from 3:35 to 4:45.

Q. Where did you leave the sheep?

A. Shelby.

Q. Were they in good order when you left them?

A. Yes.

Mr. Schulz: That is all.

Redirect Examination

By Mr. Gough:

Q. The sheep were wet?

Mr. Maury: We object to that as leading and

repetition, and it is merely for accentuating purposes.

Mr. Gough: Did he say at Shelby?

The Court: Yes, when he examined the sheep at Shelby, he saw nothing out of the ordinary except that they were wet.

Mr. Gough: I'll withdraw the question. Call Mr. Larson.

(Witness excused.) [112]

PERCY WILLIAM LARSON

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Gough:

Q. State your name, please?

A. Percy William Larson.

Q. Where do you live, sir?

A. Great Falls, Montana.

Q. Are you a conductor of the Great Northern Railway Company? A. Yes, sir.

Q. How many years have you been in train service? A. 35 years.

Q. Were you a conductor on the Great Northern train between Shelby and Great Falls on May 30, 1949? A. Yes, sir.

Q. Do you remember handling a train containing eight loads of sheep destined for Great Falls and beyond? A. Yes, sir, I do.

Q. Mr. Larson, I hand you what has been

(Testimony of Percy William Larson.)

marked for identification as Defendant's Exhibit 9, and ask you what that is?

A. It is a delay report for the movement of the train.

Q. And was that delay report made by you?

A. Yes, sir.

Q. On that date? [113] A. Yes, sir.

Q. And are the words and figures which appear there in your writing?

A. Yes, sir, they are.

Q. I notice it has not been signed.

A. We are not compelled to sign them down here; only in case of tying up, something like that; it isn't the practice to sign them down there.

Mr. Gough: I offer in evidence Defendant's proposed Exhibit number 9.

Mr. Maury: No objection.

The Court: It is admitted.

(Defendant's Exhibit 9, being Train Delay Report, dated May 30, 1949, here received in evidence, will be certified to the Court of Appeals by the Clerk of the above Court.)

Q. Referring to Defendant's Exhibit 9, will you state from looking at that, Mr. Larson, the time your train departed from Shelby?

A. 6:40 p.m.

Q. That was May 30, 1949? A. Yes, sir.

Q. Now, proceeding down the column of your remarks on the sheet, will you tell us where the first stop occurred? A. Conrad, Montana.

(Testimony of Percy William Larson.)

Q. How long? [114]

A. Five minutes, inspection.

Q. For inspection. What does that mean?

A. We walk around the train inspecting the running gear and the equipment and also stop for anything that we have on the train.

Q. Now, proceeding down the line further, what was the next stop?

A. Powell, nine p.m., until 11:30 p.m.

Q. What was the occasion for that stop?

A. There was another freight train in there that was disabled, had engine failure, and we couldn't get by.

Q. During that stop at Powell, were the sheep in your train moved from the main line or anything of the kind? A. No, sir.

Q. Then, after you departed from Powell, what is the next stop, Great Falls?

A. No, we went to Vaughn, 12:05 to 12:25.

Q. What is the reason for that?

A. We met the time freight there, 495.

Q. That delay there was merely a meet for another train? A. Yes, on the passing track.

Q. Your train was used for no other purpose?

A. No, sir, just set on the passing track.

Q. You did no local work, no switching?

A. No, sir. [115]

Q. Did you do any switching or any local work any place?

A. Just at Powell, cut our train off and went up

(Testimony of Percy William Larson.)

and put the other train away so the passenger train could get by.

Q. Do you mean you took the power off your train?

A. Just took our engine and went down and doubled his train in and got back to ours and let the passenger train by.

Q. During that time, the sheep were not connected with the power?

A. No, sir.

Q. When did you arrive in Great Falls?

A. 12:45 a.m.

Q. At the time you picked up the train at Shelby, did you inspect your loads?

A. Yes, sir.

Q. Did you find anything at that time wrong or in error about them?

A. No, sir, I walked around the train and everything looked O.K. to me.

Q. At the time that you inspected your train at Conrad, did you find anything wrong with your loads?

A. No, sir.

Q. Would you make any notation on your delay report as to the condition of these sheep if there was anything to be noted?

A. That is on the wheel report.

Q. I hand you what has been marked for identification as [116] Defendant's Exhibit number 10. I will ask you what that is?

A. Yes. That is the wheel report for the movement from Shelby to Great Falls.

(Testimony of Percy William Larson.)

Q. On this particular train about which we have been talking? A. Yes, sir.

Q. Was that made out by you?

A. Yes, sir.

Q. It is in your handwriting? A. Yes.

Q. And the signature of Larson, the conductor, is yours? A. That is mine.

Q. On the rear of this wheel report appears your signature again, does it not?

A. Yes, sir.

Mr. Gough: Offer in evidence Defendant's proposed Exhibit 10.

Mr. Maury: And the back of it, too?

Mr. Gough: Both the front and rear. Have you any objection?

Mr. Maury: No.

The Court: No objection? It is admitted.

(Defendant's Exhibit 10, being wheel report above referred to, here received in evidence, will be certified to the Court of Appeals by the Clerk of the above Court.)

Q. I ask you to refer to the rear of the wheel report, and on [117] the notation does it appear you have marked "Sheep O.K."?

A. Yes, I marked them O.K.

Q. At any time while the sheep were in your train, was there any rough handling?

A. No, sir, there was not.

Q. Any sudden or emergency stops made?

A. No.

(Testimony of Percy William Larson.)

Q. Where in the train were the sheep located?

A. On the head end.

Q. By the head end, you mean they were next to the power?

A. Next to the power.

Cross-Examination

By Mr. Schulz:

Q. At what point in your journey did you mark the wheel report "sheep O.K."?

A. After I left Powell, I closed up my reports and marked them O.K.

Q. What time did you leave Powell?

A. About 11:30 p.m., somewhere around there.

Q. Did you inspect the sheep after that?

A. Yes, I walked along the train at Vaughn, everything looked all right.

Q. This was in the middle of the night?

A. Yes, sir. [118]

Q. Did you get in the cars and inspect the sheep?

A. No, sir.

Q. Did you have a ladder and examine both decks?

A. We take a lantern and flash it in.

Q. Just flashed it in?

A. Yes.

Mr. Schulz: That is all.

(Witness excused.)

CLIFTON C. MARCEAU

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Gough:

Q. State your name, please?

A. Clifton C. Marceau.

Q. Where do you live? A. Great Falls.

Q. Are you employed as a conductor by the Great Northern? A. Yes, sir.

Q. How many years have you been so employed?

A. 34 years.

Q. Were you a conductor in train service on the Great Northern on May 31, 1949?

A. Yes, sir. [119]

Q. Were you conductor on train 306, time freight out of Great Falls to Butte on that date?

A. Yes, sir.

Q. Do you remember, Mr. Marceau, a shipment in your train of that date consisting of eight carloads of sheep bound for Wickes?

A. I remember it, yes, I remember handling it.

Q. I hand you what has been marked for identification as Defendant's Exhibit 11. Will you tell us what it is?

A. It is a delay report of the extra 306 west, Great Falls to Butte.

Q. Is it made out by you? A. Yes, sir.

Q. The notations appearing thereon are in your handwriting? A. All of them.

Q. The signature is yours? A. Yes, sir.

(Testimony of Clifton C. Marceau.)

Q. Does that show the operation of your train from the time it left Great Falls to its arrival at Butte? A. It does, yes, sir.

Mr. Gough: Offer Defendant's Proposed Exhibit number 11.

Mr. Maury: No objection.

The Court: It is admitted.

(Defendant's Exhibit 11, being Train Delay Report, dated May 31, 1949, here received in evidence, will be certified to the Court of Appeals by the Clerk of the above Court.) [120]

Q. I hand you now what has been marked for identification as Defendant's Exhibit 12. I will ask you to state what that is?

A. It is a delay report, or wheel report for Extra 306 West, Great Falls to Butte on May 31st.

Q. Does that show the consist and the way the train was lined up on that date? A. Yes.

Q. Does that show you had on your train eight carloads of sheep? A. Yes, sir.

Q. Where in the train were they located?

A. They were located behind seven cars on the head end.

Q. Tell us the number of cars in that train?

A. 41 cars.

Q. Now, using those documents to refresh your recollection, Mr. Marceau, will you tell us after you left Great Falls—first tell us when you left Great Falls? A. Left Great Falls 4:55 a.m.

Mr. Maury: 4:55? A. That's right.

(Testimony of Clifton C. Marceau.)

Q. Where was your first stop?

A. Cascade, Montana.

Q. How long?

A. We arrived at 5:55 and departed at 6:05.

Q. For what purpose was that stop made? [121]

A. Train inspection, 10 minutes.

Q. During the inspection of the train, do you remember what took place?

A. The engineer drops off the engine and comes back until he meets the man from behind, and then he walks back up the opposite side and looks at the running gear and the condition of the stock or anything we have on the train.

Q. Did you make any notation at that time regarding the loads in your train?

A. We did if we found anything wrong.

Q. If there was nothing wrong, you made no notation?

A. I don't find any notation on here at all, just "10 minutes inspection."

Q. Where was the next stop?

A. Wolf Creek.

Q. How long? A. From 7:05 to 7:15.

Q. Did you inspect the train at that point?

A. Yes, I inspected the train and the head brakeman unloaded one piece of way freight then.

Q. After inspection of the train, did you discover anything was wrong?

A. Didn't discover anything wrong.

Q. Where was the next stop?

A. Helena, 8:35 to 9:30, 55 minutes. [122]

(Testimony of Clifton C. Marceau.)

Q. Explain the cause of the stop there?

A. Stopped to eat, 30 minutes to eat, and 25 minutes waiting for a switch engine to take the Helena loads off the train.

Q. Waiting for a switch engine to take the Helena loads off the train. Explain that movement.

A. According to the wheel report, there was only seven cars right next to the engine that he picked off the train.

Q. Did he move your train other than to pick off the load?

A. No, I don't know why he would; I don't know what he would move it for.

Q. Did you inspect the train there?

A. Yes, sir, the hind brakeman and the conductor left the train and it pulled by, and they seen both sides of the train.

Q. Did you see anything wrong at that time with the eight cars of sheep? A. No, sir.

Q. And were you able to see the sheep from the ground? A. Yes, sir, it was daylight.

Q. After you left Helena, where did you next stop?

A. Stopped next at Wickes, arrived there at 10:30.

Q. How long were you there at Wickes?

A. We departed at 11 a.m., 30 minutes, switching and inspection.

Q. Will you explain to us, Mr. Marceau, just what happened when you pulled the train up at Wickes? [123]

(Testimony of Clifton C. Marceau.)

A. I had the brakemen cut eight cars of stock off and then pulled the train up the creek. I walked from the caboose up and I arrived there when they were shoving the cars in.

Q. You say "shoving the cars in." You mean shoving them out on the spur track to the stock yard?

A. That's right.

Q. Go ahead.

A. When I got there, I met Mr. Melton. I didn't know who he was at that time; I didn't know he was Mr. Melton. He was pretty well put out when I told him I couldn't unload them, just set them out and go. He was pretty mad and wanted me to stop and unload them. If I can remember, he wanted one certain car spotted. He said if he could get that one spotted, it wouldn't be so bad. That is the way I remember.

Q. Did you spot the one certain car?

A. That car, if I remember right, was so he could unload out of it, yes.

Q. Did you explain to Mr. Melton the reason why you could not delay your train?

A. I told him I had a message from the dispatcher to set them out and go.

Q. At that time, Mr. Marceau, was anything said to you, or did you note any condition of the stock in the cars?

A. I didn't notice any piled up or anything. We generally move so much that we wouldn't pay much attention to them. All [124] I did was get the stuff set out and get out of town.

(Testimony of Clifton C. Marceau.)

Q. Did you observe the cars of stock when being set out at the stockyard track?

A. I observed them crawling up on the cars and setting the brakes and what you could see from the ground.

Q. You observed no pile-ups? A. No, sir.

Q. Did you observe any sheep in the car as fallen down or having fallen down?

A. I didn't notice that from the ground. We didn't see any. The brakeman didn't see any, or he would have reported to me, I suppose.

Q. Now, you said you and Mr. Melton had some conversation. Where did that conversation take place?

A. Right at the stockyard chute. When we backed in there, somebody hollered; as we were shoving by, I went around the car and talked to him right at the stock chute.

Q. You and Mr. Melton stayed at the stock chute during the 30 minutes?

A. No, that 30 minutes included setting out and coupling up. I don't suppose I talked to him over five minutes.

Q. Was anyone else present at that time?

A. There was several around there; I don't know who they were.

Q. Did you notice Mr. Melton or any other person not connected with your train crew in the course of going through the cars? [125]

A. Not while I was there.

(Testimony of Clifton C. Marceau.)

Q. Now, Mr. Marceau, on the transportation from Great Falls to Wickes, at any time, did anything happen to your train in the way of rough handling or sudden stops or emergency application of air which would cause any damage?

A. No, sir.

Q. Did anything happen to that train out of the ordinary? A. No.

Q. Did you make any notation on either the wheel report or the delay report as to anything unusual occurring on that trip?

A. No, sir, I did not.

Q. Have you been operating on this end of the Butte Division between Butte and Great Falls for some time?

A. The biggest part of my 34 years, yes, sir.

Q. Have you had in that time occasion to haul livestock, both sheep and cattle, between Great Falls, Helena, and Butte?

A. Yes, lots of it, yes, you bet.

Q. Is there anything in the grade of the railway company between Helena and Wickes in particular which would cause damage to livestock?

A. It is a 2.2 grade, but I don't know if it would cause damage to stock going over there.

Q. Has it in the past caused any damage?

Mr. Maury: Objected to as not material and not convincing or proving anything as to what happened on this particular trip. [126]

Court: Sustained.

Q. Mr. Marceau, when you set your train in the

(Testimony of Clifton C. Marceau.)

siding there connected with the stockyard, you and your brakeman set the brakes on the cars before you took off the power?

A. I don't remember which one of us done it; one of us or both of us maybe. All eight cars had to be tied down.

Q. The train was tied down?

A. Tied down by the rear brakeman on the main line. The eight cars had to be tied down before we could leave them.

Mr. Gough: You may cross-examine.

Cross-Examination

By Mr. Schulz:

Q. I believe you told us, Mr. Marceau, you departed from Helena at 9:30?

A. Departed from Helena 9:30 a.m., yes, sir.

Q. When did you arrive at Wickes?

A. At 10:30.

Q. What distance is that?

A. The mileage from Helena to Wickes? I would have to have a time card to Butte to figure that out, 36 miles, I think—26 miles, a little more or less.

Q. When you saw Mr. Melton there at Wickes, what did he say to you?

A. I couldn't remember that. [127]

Q. Did he, in effect, report to you the sheep were in bad condition?

A. I don't know whether he said so much, whether he did that or not, but I thought he said

(Testimony of Clifton C. Marceau.)

something about one car he would like to unload first.

Q. He was making some complaint about the condition of the sheep?

A. He was complaining plenty about us not unloading them.

Q. He wanted you to spot the cars, is that correct? A. That's right.

Q. Which you refused to do?

A. I didn't refuse; I told him my instructions said not to.

Q. You failed to do it? A. I didn't do it.

Q. I understand throughout the course of the trip, whenever you made an inspection, you walked along the ground to inspect your cargo, is that correct? A. Yes, sir.

Q. These sheep were in double decks?

A. Yes, sir.

Q. From your position on the ground, you, of course, couldn't observe the condition of the sheep in the upper deck?

A. It would be hard to unless you went up to make a check-up.

Q. How many cars did you have in the train between Helena and Wickes? [128]

A. Between Helena and Wickes, we had 14 loads and 19 empties.

Q. 14 loads and 19 empties?

A. That's right, that is 33 cars.

Q. What type of power did you have?

(Testimony of Clifton C. Marceau.)

A. The 306 is a 3-unit Diesel Delco, 3-unit Diesel.

Q. I believe you said that all eight cars had been tied down once they were put on the spur, is that correct? A. Yes, sir.

Q. What do you mean by tied down?

A. Set the hand brakes so they won't start running away when there was nobody with them.

Mr. Schulz: That is all.

(Witness excused.)

WALTER S. LUKASIK

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Gough:

Q. State your name, please?

A. Walter S. Lukasik.

Q. You are residing at Great Falls?

A. Yes, sir.

Q. You are in train service with the Great Northern Railway? A. Yes, sir. [129]

Q. Were you head brakeman on Extra Time Freight 306 out of Great Falls May 31, 1949?

A. Yes, sir.

Q. Do you recall delivering to Wickes, Montana, eight carloads of sheep that day? A. I do.

Q. Now, as head brakeman, do you make an inspection of the train at inspection stops?

(Testimony of Walter S. Lukasik.)

A. I make inspection of the forward half of the train.

Q. Did you follow that practice that day?

A. Yes, I did.

Q. I believe it has been testified to here that that particular train stopped at Cascade, Wolf Creek and Helena prior to reaching Wickes?

A. Yes, it did.

Q. And at each one of those points an inspection took place. Did you take part in that inspection?

A. Yes, I did at Cascade, the head half of the cars.

Q. At that time did you notice anything out of the ordinary with regard to the eight cars of sheep?

A. Not a thing.

Q. They are moving in the ordinary condition of shipment?

A. Everything appeared normal on the train.

Q. You did not inspect the train at Wolf Creek?

A. No, I didn't; I had to unload some way freight there. [130]

Q. Did you inspect the freight at Helena?

A. I cut the engine off and got back and waited for the rear man to come up, and I did get down around the stock and did look it over.

Q. Did you notice anything out of normal there?

A. Nothing out of normal.

Q. On arrival of the train at Wickes, did you cut off the eight cars of sheep?

A. Yes, I go back and make the cut there. They pull up and back them into the stockyards.

(Testimony of Walter S. Lukasik.)

Q. You had to inspect the eight cars of sheep to make the cut? A. Yes.

Q. Did you look at the sheep at that time?

A. Yes, I looked at the sheep; I made it a practice to do it.

Q. Did you observe anything out of the ordinary? A. Not a thing.

Q. Were any sheep piled in the ends of the cars?

A. No, I don't believe there was any; I would have noticed that if they were.

Q. After the sheep were put on the spur track leading to the stockyard, do you recall them again?

A. Yes, sir, there was a little work to be done there spotting this one car, and I talked with the conductor there and I walked back and met him and we had to go back and pass signals [131] and get up and down the cars and put on some brakes, and I did get a look at them then.

Q. Did you see any sheep piled up in the cars then? A. No, I didn't.

Q. During the trip from Great Falls to Wickes, did the train experience any rough handling?

A. No, we didn't have any rough handling at all. We had one of the best engineers we got on that line.

Mr. Maury: Move to strike that, "one of the best engineers we got on that line."

Court: Very well, it may be stricken.

Mr. Maury: It might not mean much anyway.

Mr. Gough: You may cross-examine.

(Testimony of Walter S. Lukasik.)

Cross-Examination

By Mr. Schulz:

Q. In your inspection of this shipment that you made at Cascade, again at Helena, and again at Wickes, did I understand you merely walked throughout the length of the train or whatever portion of the train you were covering on the ground?

A. Yes.

Q. From your position on the ground, could you observe the condition on the upper deck?

A. Not on the upper deck. I feel if the lower deck is O. K., the upper one will be the same. [132]

Q. You were just expressing then what you saw on the lower deck; the upper deck you would be unable to see?

A. Yes, it is impossible to see the upper deck from the ground.

Q. Did you hear Melton complain to the conductor as to the condition of the sheep?

A. No.

Q. Did the conductor say anything to you about a complaint having been made?

A. No, he didn't discuss that with me.

Mr. Schulz: That is all.

(Witness excused.)

J. W. EWINSKI

called as a witness on behalf of the defendant,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Gough:

Q. State your name, please?

A. J. W. Ewinski.

Q. You reside in Great Falls, do you not, sir?

A. Yes, sir.

Q. You are employed as a conductor by the
Great Northern Railway? A. Yes, sir. [133]

Q. You were so employed on May 31, 1949?

A. Yes, sir.

Q. How long have you been in train service?

A. 38 years.

Q. Were you the conductor on the train known
as the Butte Local which unloaded eight carloads of
sheep at Wickes, May 31st, for Mr. Melton?

A. Yes, sir.

Q. I hand you what has been marked for identi-
fication as Defendant's Exhibit 13. I will ask you
to tell us what that is?

A. That is my delay report out of Butte on May
31st, Extra 259 East.

Q. That shows your departure time from Butte
that morning? A. Yes.

Q. What was it?

A. I was called at nine a.m., and departed at
9:20.

Q. Does it show your arrival time at Wickes?

(Testimony of J. W. Ewinski.)

A. Yes, 11:50 a.m.

Q. Now, were the entries which you have spoken of on this delay report made by you?

A. Yes, sir.

Q. In your handwriting?

A. That is not my handwriting (indicating).

Q. The signature over here? [134]

A. That is not my handwriting.

Q. Did one of your brakemen sign that for you?

A. He must have, it is not necessary to sign that thing.

Q. But the entries regarding the movement of the train were made by you at that time and are in your handwriting? A. Yes, sir.

Mr. Gough: Offer in evidence Defendant's Exhibit 13.

Mr. Maury: No objection.

The Court: It is admitted.

(Defendant's Exhibit 13, being 'Train Delay Report dated May 31, 1949, here received in evidence, will be certified to the Court of Appeals by the Clerk of the above Court.)

Q. Now, referring to Defendant's Exhibit 13, will you state when your train got to Wickes?

A. It arrived at Wickes at 11:50 a.m.

Q. How long was it there?

A. Well, we were there approximately 50 minutes because I show the arriving time back to Amazon at 1:15.

Q. Explain that "back to Amazon."

(Testimony of J. W. Ewinski.)

A. I had left the major portion of the train at Amazon and took the power and caboose to Wickes to unload this stuff, and we possibly unloaded the stock in 45 to 50 minutes and took the empties back to Amazon.

Q. First, where is Amazon?

A. Amazon is about two and a half miles west of Wickes. [135]

Q. Well, westward by railroad directions, you mean toward Butte? A. Toward Butte.

Q. Now, Mr. Ewinski, do you remember when you arrived there with your engine that day as to the location of the eight cars of stock?

A. Yes, sir.

Q. Where were they?

A. There was one spotted to the chute and two of them were shoved back beyond it, that is, towards Helena. One car was unloaded.

Q. When you got there, there was one empty car? A. There was one empty car?

Q. Did you stay and unload the other seven cars? A. I unloaded the other seven cars.

Q. You connected your power to the eight cars?

A. To the eight cars.

Q. And moved the cars to the chute to unload as the preceding car was cleared, is that right?

A. Yes.

Q. Now, Mr. Ewinski, did you, yourself observe these sheep as they were being unloaded?

A. Yes, I did.

Q. Where were you standing to observe them?

(Testimony of J. W. Ewinski.)

A. About around the chute, right around the chute. I would say [136] the chute side of the spur.

Q. Did you observe the condition of the sheep while being unloaded? A. Yes, I did.

Q. Did you make any attempt to handle the sheep or feel them? A. I did, I felt them.

Q. Will you tell me whether or not the sheep were wet at that time?

A. Yes, they were wet, wet and dirty.

Q. During the unloading operations, did the sheep come out of the cars readily or not?

A. They came out of there in good style. We unloaded them in about 45 minutes, seven cars.

Q. You unloaded seven cars in 45 minutes. Was it necessary to assist any sheep out of the cars?

A. Maybe at times there would be a bunch you had to scare them; you would have to go in and run them out, but they all came out very readily.

Q. Did you see any sheep which were piled up in those cars? A. No, I didn't.

Q. Did you see any sheep crowded into the corners of the cars?

A. Well, no, not crowded in. The minute the cars were spotted there, the sheep came out very rapidly.

Q. I believe you stated that the sheep were dirty? A. Yes, they were. [137]

Q. Were they—what was this dirt?

A. I imagine it was sand, manure and water.

Q. Did you notice any sheep being unloaded which were crippled or injured?

(Testimony of J. W. Ewinski.)

A. No, I didn't.

Q. Did you notice any sheep with scars and scratches or their flesh visible or anything?

A. No, no, I didn't.

Q. Did you see any dead sheep?

A. Yes, I did.

Q. Do you remember how many?

A. There was two or three grown ones that were dead.

Q. They were dead in the cars? A. Yes.

Q. While you were there with the power connected to this string of cars, did anything unusual happen in the handling of the cars, any slipping or any hard switching? A. No.

Q. Did you, when you first observed the sheep, see any sheep that were in either end of the cars in a pile? A. No, I didn't.

Q. Did Mr. Melton have any conversation with you regarding the sheep?

A. Yes, he did, he was very mad at the railroad company for not spotting, for the first train not spotting the sheep to unload. [138]

Q. Did he complain to you about the condition of the sheep?

A. He says they were very wet and they should be unloaded.

Q. The operation of the local that day in unloading the sheep—— (Interrupted.)

A. What was that?

Q. Your operation that day on the local train in

(Testimony of J. W. Ewinski.)

unloading the sheep, is that the customary and normal method of handling this?

A. I have done that several times at Wickes, I have unloaded sheep there that the west bound main has set out, well, at least twice besides this one.

Q. Did you notice the condition of the stock cars in which the sheep were loaded?

A. Yes, they were mucky.

Q. Were they wet?

A. Yes, the decks were pretty wet and mucky.

Q. As I understand it, there was one car which had been unloaded before you arrived?

A. Yes.

Q. Did you see any party present that day who had to assist the sheep out by dragging them or anything of the kind, sick sheep?

A. No, I saw a young fellow drag out a dead sheep.

Q. Did you see any sick sheep in this [139] shipment?

A. They didn't look sick to me, they run out there like jack rabbits.

Cross-Examination

By Mr. Schulz:

Q. I understand you assisted in unloading the sheep?

A. No, I didn't assist in unloading them; I spotted cars.

Q. Did you participate in unloading at all?

A. Just in spotting the cars.

(Testimony of J. W. Ewinski.)

Q. You didn't engage in getting into the car and moving them out? A. No.

Q. Did any of the members of your crew do that?

A. They might have helped shut gates or put down boards; I don't just remember if they did.

Q. How are cars bedded, that is, what covers the floors?

A. Well, it looked to me like sand, manure and water.

Q. They were bedded with sand?

A. And manure.

Q. Is that the usual practice to bed stock cars with sand?

A. The railroad company puts sand in there.

Q. This sand you observed on the sheep was much the same as what the cars were bedded with?

A. That is what it looked like.

Q. The same color? [140] A. Yes.

Q. You say when you saw Mr. Melton, he was mad? A. Yes, he was mad.

Q. How did he indicate that?

A. He says something about paying a lot of money and not getting service. What he was mad at mostly is the train that set the sheep out didn't spot them.

Q. Was he unhappy about the condition of the sheep? A. I think he was unhappy, yes.

Q. Do you recall what Mr. Melton said?

A. Well, I couldn't say the exact words, but the information that I gathered was that he paid out a

(Testimony of J. W. Ewinski.)

lot of money and didn't get the service he should have got.

Q. The sheep had come through in bad order?

A. He didn't say anything about bad order. He said he should have got more service for the money he paid out.

Q. Do you recall whether or not these other shipments you unloaded there at Wickes were Mr. Melton's sheep?

A. I just loaded some with the young fellow there the other day. I believe it must have been Melton's that day.

Q. That was the only shipment you recall?

A. No, there was a couple other shipments.

Q. For Mr. Melton? A. I think so.

Mr. Schulz: That is all.

(Witness excused.) [141]

DR. HAROLD L. NORDELL

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Gough:

Q. State your name, please, sir?

A. Harold L. Nordell.

Q. Where do you reside, Doctor?

A. Great Falls, Montana.

Q. Are you a veterinarian? A. Yes.

Q. Are you licensed and qualified to practice in the State of Montana? A. Yes.

(Testimony of Dr. Harold L. Nordell.)

Q. Are you now a practicing veterinary in Montana? A. Yes.

Q. How long have you been engaged in the practice of veterinary medicine in Montana?

A. Approximately eight years.

Q. Now, Doctor, you have been present in the courtroom and heard testimony regarding this shipment of sheep by Mr. Melton to Wickes. To hasten the matter, did you, at the request of the Great Northern, examine Mr. Melton's sheep at Wickes on June 11, 1949?

A. I examined them on that date. [142]

Q. Was Mr. Melton present with you at the time? A. Yes.

Q. Will you tell us what you observed at the time you made this examination near Wickes?

A. We arrived about one o'clock. They were unloading the shipment. They finished that, and he showed me the decomposed carcasses of approximately five head by the tracks, two bucks and three ewes. It was practically impossible to tell what they were. We went up to the house and they had lunch, and he showed me 20 some head around the area, dead sheep. They were decomposed and in bad shape. I couldn't tell too much about them. We arrived at a count of 31 head all told, dead sheep around the immediate vicinity, and then drove by county road back towards Helena to a mountain pasture, and we went up in the pasture, and I spent about two hours looking through these other sheep. They were—it was rough country, a creek there,

(Testimony of Dr. Harold L. Nordell.)

some trees and brush, and it was hard to get a look at the whole bunch together. I spent about two hours there, and I picked out approximately 10 or such a matter that were in bad shape.

Q. You better speak up, Doctor, it is hard to hear you in the courtroom.

A. I found about 10 head in bad shape there still alive; another hundred that showed signs of being extremely dirty a few days previous, and they were still dirty, and with some [143] marks like something happening in the way of being down, or what have you. The whole herd was dirty in various stages of dirt. We picked out at that time, as near as I could tell, approximately 75 or 100 bum lambs. This is all an estimate. At that time, I just couldn't get all these sheep together in that certain field.

Q. Now, Doctor, in your experience as a veterinary surgeon, have you had considerable experience with sheep in shipment, during shipment, and after shipment?

A. Some; not as much during as after shipment, that primarily at some unloading point.

Q. You have had occasion to notice sheep after shipment? A. Yes.

Q. And made investigations to determine the condition of sheep? A. Yes.

Q. Now, from your investigation of the band of Mr. Melton's at this time, were you able to determine the cause of the death of any of those that had died? A. No.

(Testimony of Dr. Harold L. Nordell.)

Q. It was impossible to make a post mortem, was it not?

A. All the dead sheep were in a bad state of decomposition.

Q. Now, Doctor, if sheep were loaded in stock cars wet, and in particular, ewes with young lambs, and assuming they are loaded when wet, is that advisable for the health of the sheep? [144]

A. Not wet.

Q. Is it liable to create a condition of unhealthfulness to those sheep?

A. It can, depending much on the weather.

Q. Well, assuming then, the sheep were loaded dry and became wet during the course of shipment and became soaked, could that create a hazardous condition to the sheep? A. Yes.

Q. I didn't hear your answer. A. Yes.

Q. What is the hazard it creates, that condition?

A. We have the hazard of exposure, causing respiratory illness; they could pick up this mud, and in mixed shipments of lambs and ewes, the ewes will fail to claim their lambs; the decks of the cars become slippery.

Q. Now, Doctor, what, in your opinion as a qualified veterinary, would be the outcome if sheep were piled up in the ends of stock cars for as much as one hour?

A. If sheep were piled there would be some smothering.

Q. Smothering. That smothering would cause death to the sheep, would it not? A. Yes.

(Testimony of Dr. Harold L. Nordell.)

Q. In the shipment of approximately 1,000 head of ewes and 900 lambs in eight carloads, and 74 bucks, if they were piled up, would you expect to find as few as six or eight dead? [145]

A. I didn't quite understand.

Q. If, in a shipment of over 1000 ewes and approximately 900 lambs and 74 bucks, loaded into eight cars, double deck stock cars, they were piled up during the course of shipment in the ends of the cars, what percentage of death loss would you, in your opinion, think would occur?

A. I don't have any way of knowing an intelligent percentage. Actually piled in eight cars, you could have considerable dead sheep if they were piled long. It would be impossible to exist without air.

Q. Would you expect to find several dead sheep in each car? A. Yes.

Q. And, if in this shipment were a number of young lambs, approximately a month old, would you expect to find many dead?

A. Ordinarily, not as many lambs.

Q. Pardon.

A. Not as many lambs. You would find some.

Q. But there would be some dead lambs, would there not? A. There should be.

Q. Now, if the sheep in transit is jammed or bounced around to the point where it is injured or wounded, won't that sheep develop to a critical stage of sickness immediately?

(Testimony of Dr. Harold L. Nordell.)

A. Depending on the extent of injury, usually they will show a sickness within a few days.

Q. Well, if the sheep was wounded during the course of shipment, [146] doesn't the wound or the effect of the wound develop within a day or two after the shipment?

A. Not that short a time.

Q. How long would it take?

A. I would estimate there would be a hangover from wounds as high as a month.

Q. You mean the effect of the wound would continue that long? A. Yes.

Q. But would the wound not develop until two or three weeks after the shipment?

A. Any wound gotten in shipment should distinguish itself at that time. However, deep muscular wounds are visible at the time.

Q. By wound, of course, I mean external wound, something that is obvious and can be seen.

A. Yes.

Q. Now, Doctor, is it true that sheep which have been subjected to rain and have become wet during shipment will indicate signs of that by stiffness and soreness after the transportation has ceased? A. There will be some stiffness, yes.

Q. Now, Doctor, you have heard some of the testimony here regarding the loss of scent between ewe and lamb. Could you explain that a little further to us? What causes that?

A. The sheep is, like all of us, rather a stupid animal. [147] That is the only means of identifica-

(Testimony of Dr. Harold L. Nordell.)

tion they have, the scent. When covered by foreign matter, they are unable to identify their lambs.

Q. You say covered. If sheep become wet and pick up on the damp wool a manure, mud, something of that kind, will that serve to cancel out this scent? A. Yes.

Q. Can that condition arise during shipment of sheep, wet sheep, in stock cars?

A. To some extent, yes.

Q. Now, referring to the sheep as an animal, Doctor, would you give us something about the characteristics of sheep. In other words, is it an animal that is easily subject to fright?

A. Yes, they are.

Q. Well, from your experience and knowledge regarding the sheep, would you say that the sheep is an animal that reacts to any situation in many different ways?

A. If they are frightened, they will follow a leader.

Q. Have you, in your experience seen sheep pile up for some reason because they became frightened, they may not know why, not just in stock cars, but in fields and fence corners? A. Yes.

Q. It does happen, does it not? A. Yes.

Q. Now, if a shipment of sheep was transported some 200 odd [148] miles, and during that transportation were so handled roughly and banged around as to cause the crippling of a good number of them and damage to others, would it not be true

(Testimony of Dr. Harold L. Nordell.)

that there would be a number of dead sheep at the end of the transportation? A. Yes.

Q. In other words, the damaged shipment of sheep that has been testified to here, would it not be almost impossible not to have killed a number of them?

A. Rough handling would kill numbers of them.

Q. If sheep became wet during the course of transportation and picked up mud and manure from the car, or sand, would that cause them to lose their scent? A. Yes.

Q. That is a natural or inherent weakness of that animal, is it not? A. Yes.

Q. The same with the fright of the sheep, it is an inherent characteristic of the sheep, is it not?

A. Yes.

Cross-Examination

By Mr. Schulz:

Q. Doctor, as I understand, when you examined the sheep at Mr. Melton's ranch, a great part of them were out on the range, [149] scattered, and you were unable to see all of the sheep, is that correct?

A. So far as I know, he showed me all the sheep, but I couldn't see them at one glance.

Q. Did Mr. Melton invite you to return at shearing time? A. Yes.

Q. Did you return?

A. No. I might answer that this way: he suggested someone weigh the sheep at shearing time, not me particularly.

(Testimony of Dr. Harold L. Nordell.)

Q. Didn't he invite you to return though?

A. Not particularly me.

Q. I will ask you this question, Doctor: If these sheep were dry when loaded and were in transit for 20 hours and exposed to intermittent showers and light rain, and there was no piling and no rough handling, would you have a death loss of 31 head and would you have 100 ewes that showed signs of being extremely dirty, and would you have 75 to 100 bum lambs within 10 days afterwards?

Q. You could have that without rough handling.
Mr. Gough: I didn't hear that.

The Court: You could have that without rough handling.

Q. What would be the cause of it?

A. The wet deck of cars.

Q. You understand my question there, the sheep were loaded dry? [150] A. Yes.

Q. And we have nothing but intermittent showers throughout the journey in transit for about 20 hours, and no piling, and you say it would be normal to anticipate 75 to 100 bum lambs within 10 days after that?

The Court: He said you would if you had wet decks.

Q. You didn't see the cars, Doctor?

A. No.

Q. Would it be reasonable to anticipate that just from the fact that showers had been experienced, you would have that many bum lambs out of 900 head? A. No.

(Testimony of Dr. Harold L. Nordell.)

Q. Would you have a death loss of 31 ewes, Doctor? A. No.

Q. No, nor would you have 100 ewes that had apparently been rolled in the muck and were dirty on that kind of a journey, would you?

A. Not without a wet car.

Q. Now, then, let us assume one further fact. Assume that this piling up actually occurred within a period of time of one hour or shorter before they were unloaded, what would you expect the normal death loss to be?

The Court: He already testified with reference to questions by counsel that it would serve no purpose to ask him about piling up because he doesn't know how many piled up. [151]

Mr. Schulz: I believe that is all.

Redirect Examination

By Mr. Gough:

Q. I may have misunderstood the question, but as I understood the question propounded by counsel and the answer given regarding the shipment of sheep loaded dry—see if I am right on this—loaded dry, and in the course of transportation you have about 20 hours through intermittent showers, that you would not expect the loss which counsel asked you about?

Mr. Schulz: And no rough handling.

Q. As I understood you to say that—you answered it by saying you wouldn't have that result

(Testimony of Dr. Harold L. Nordell.)

without having a wet deck or wet car. That is what you meant? A. That's right.

Q. If the cars were wet or became wet during the transportation from rainfall, you would have that result of which counsel has asked?

A. If they became wet, yes.

Mr. Gough: That is all.

(Witness excused.)

Mr. Gough: With agreement of counsel, I would like to introduce in evidence what has been marked for identification as Defendant's Exhibit 14, which purports to be a weather chart prepared by R. A. Dightman, Section Director of the [152] Weather Bureau Office at Helena, Montana. On this, on the legend appears certain information regarding rainfall from reporting stations from the northern section of Montana, running south toward Butte over the course of the transportation of the sheep involved in this case, also the report of the reporting stations of the weather temperature.

Mr. Maury: For what dates?

Mr. Gough: May 30 and 31, 1949.

Mr. Maury: For the full 48 hours. If the witness were here, he would testify he made the chart. I believe the witness won't be available in Helena tomorrow.

Mr. Gough: We offer in evidence Defendant's Exhibit 14.

The Court: Very well, it is admitted.

(Defendant's Exhibit 14, being Weather Chart of Montana for May 30 and 31, 1949, signed by R. A. Dightman, Section Director, Weather Bureau Office, Helena, Montana, here received in evidence, will be certified to the Court of Appeals by the Clerk of the above Court.)

Mr. Gough: The defense rests.

Mr. Maury: We have one short rebuttal witness.

JACK THOMAS

recalled as a witness on behalf of the plaintiff, having been previously sworn, testified as follows:

Direct Examination

By Mr. Schulz:

Q. Mr. Thomas, this morning I believe you testified some of these sheep in this shipment were pregnant ewes, that is, lambs had not yet been born. I will now ask you if, after further consideration of that, whether or not that was a correct answer?

A. No, I was wrong on that. All the pregnant ewes were in the last shipment; I mean everything in the first shipment had lambed out.

Q. The number of ewes over and above the lambs, would you term them dry ewes?

A. Yes, sir.

Q. Do you recall having had a conversation with the witness Porter on the morning of May 30th at Kevin?

A. Yes, we talked up there.

Q. What was your conversation?

A. Well, I told him, there was a bad cloud com-

(Testimony of Jack Thomas.)

ing over. I said if that thing hits here, I said we wouldn't load the sheep. That cloud passed over, the sun came out and a kind of a wind, and the sheep dried out. That was about it.

Q. During any time from the commencement of loading operations until the operations were concluded, did it rain?

A. Not to my knowledge, no.

Q. Were you present at all times during the loading? A. Yes, sir.

Q. With reference to the loading of the bucks, state whether [154] or not 74 bucks of the size of this particular shipment, would you say that would be a reasonable number to load to a car?

A. That is not too heavy for a deck, no.

Q. That is not too heavy? A. No.

Q. I believe you already testified this morning as to the condition of these sheep when loaded, as to whether or not they were damp, wet, or dry?

A. Yes.

Q. What was it? A. They were dry.

Cross-Examination

By Mr. Gough:

Q. You testified that the 74 head of bucks in the car were not an overload? A. It isn't.

Q. That would depend, of course, on the size of the bucks, would it not, and the weight of the bucks? A. That's right.

Q. So, if your bucks had—do you know the average weight of those bucks?

(Testimony of Jack Thomas.)

A. All I know is what the agent said, but I know they never weighed anywhere near that.

Q. Do sheep weigh more wet than dry? [155]

A. I say the bucks were nowhere near 200 pounds.

Q. Would sheep weigh more wet than dry?

A. Yes, you might be able to put eight pounds on them if you poured water on them all day.

Q. I believe you testified just now these sheep were dry when loaded?

A. Yes, they were pretty dry.

Q. Were they absolutely dry?

A. They could have been a little damp, but they weren't wet.

Q. They had been wet previously?

A. They were in the shower.

Q. And it was a matter of some concern to you whether or not they should be loaded wet or not?

A. The concern to me was that big cloud hanging overhead.

Mr. Gough: That is all.

(Witness excused.)

Mr. Maury: We rest. [156]

State of Montana,
County of Silver Bow—ss.

I, John J. Parker, hereby certify that I am the Official Court Reporter of the above-entitled Court; that I reported in shorthand the proceedings had and the testimony in the cause of George M. Melton,

Plaintiff, vs. Great Northern Railway Company, a corporation, Defendant, being Cause No. 459 of the above-entitled court, which was tried before the Hon. W. D. Murray, U. S. District Judge for the District of Montana, sitting without a jury at Helena, Montana, on September 27, 1950; that I thereafter transcribed the same, and that the foregoing is a true, correct and complete transcript of the proceedings had at the trial of said cause.

Dated at Butte, Montana, this 24th day of February, 1951.

/s/ JOHN J. PARKER,

Official Court Reporter.

[Endorsed]: Filed March 5, 1951. [157]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify that the annexed papers are the originals filed in Case No. 459, George M. Melton, Plaintiff, vs. Great Northern Railway Company, a corporation, Defendant, and designated by the defendant as the record on appeal in said cause; and I further certify that I transmit herewith, as a part of the record on appeal, the Reporter's Transcript of Record filed March 5, 1951, and the exhibits called for

in the designation, to wit: plaintiff's exhibits Nos. 1, 2 and 3, and defendant's exhibits Nos. 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14;

I further certify that defendant's exhibits Nos. 6 and 7 called for in the designation were not introduced in evidence, except portions thereof as shown by the Reporter's Transcript, pages 91 to 99, testified to by the witness J. R. McClelland.

Witness my hand and the seal of said Court at Helena, Montana, this 11th day of April, A.D. 1951.

[Seal] /s/ H. H. WALKER,
Clerk as Aforesaid.

[Endorsed]: No. 12903. United States Court of Appeals for the Ninth Circuit. Great Northern Railway Company, a corporation, Appellant, vs. George M. Melton, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Montana, Helena Division.

Filed April 14, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

12903

GREAT NORTHERN RAILWAY COMPANY, a
Corporation,

Appellant,

vs.

GEORGE M. MELTON,

Appellee.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD

Statement of Points on Which Appellant Intends
to Rely

The United States District Court erred in
finding:¹

1. That there was no consideration for the special contract limiting defendant's statutory liability.

2. That defendant accepted said sheep for carriage over its line as being in apparent good shape and fit to travel over said line to Wickes, Montana.

3. That defendant had weather information available to it and knew, or could have known, in the exercise of reasonable care, that more rain and wet conditions were to be expected at the time of shipment.

4. That said sheep were all jammed up in the

¹Findings of Fact and Conclusions of Law.

north end of each and every railroad car.

5. That defendant was negligent in accepting for carriage and in transporting to Wickes, Montana, the said shipment of sheep when it knew, or in the exercise of reasonable care, should have known, that it might rain on said sheep during the course of transportation to Wickes, Montana, and that damage to said sheep as a result of such additional rain would occur.

6. That defendant was negligent in not properly caring for said sheep or properly inspecting said sheep to determine their condition after they were rained upon during the course of transportation from Kevin, Montana to Wickes, Montana.

7. That the damage to the sheep did not occur as a result of any inherent defect, vice, weakness or spontaneous action of the property itself and that the damage caused was not a result of any irresistible superhuman cause.

8. That the damage to said sheep was directly proximately caused by defendant's negligent acts and omissions and that such negligent acts and omissions were the proximate cause of plaintiff's loss.

9. That at the time of delivery and loading of said freight, said livestock was in good condition.

10. That said livestock had no greater value than \$20,000.00 by reason of the negligent manner in which the defendant transported the same.

11. That plaintiff sustained loss or damage by

reason of defendant's negligence in the sum of \$4,051.00, or in any other sum.

The Court erred in failing to find:²

12. That the transportation of said sheep by plaintiff from Kevin, Montana to Wickes, Montana, was subject to the provisions of the Uniform Live-stock Contracts entered into between plaintiff and defendant prior to the commencement of the transportation of said sheep and that said contracts were in full force and effect at the time of shipment of said sheep and during the course of the transportation thereof.

13. That the provisions of said contracts, to wit, Section 1(a) and (b) and Section 4(a) were in full force and effect and that the plaintiff was bound thereby.

14. That it is inherent in the nature of sheep, when wet and muddy, to lose their scent of each other, resulting in ewes and lambs being unable to identify each other.

15. That plaintiff was in sole charge of, and responsible for the loading of said sheep at Kevin, Montana, and was liable for any risk incident to loading said sheep in the condition then and there existing, or in the manner or method of loading.

16. That no evidence of negligence on the part of the defendant was proved by plaintiff, either as charged in his complaint or otherwise.

²Defendant's Request for Findings of Fact and Conclusions of Laws.

17. That the damage suffered by plaintiff to his said shipment of sheep was a result of the inherent vice, weakness and natural propensity of the sheep themselves, the change of weather to which said shipment of sheep was subjected and the climatic conditions of the heat and cold existing during the course of transportation and these were risks assumed by plaintiff for which defendant was not liable or responsible, being relieved of liability therefor by reason of the provisions of the Uniform Livestock Contracts governing said shipment of sheep.

The Court erred in its Conclusions of Law:¹

18. That the special contract between defendant and plaintiff purporting to relieve defendant of its statutory liability is invalid and not binding upon plaintiff for the reason that there is no consideration for such a special contract.

19. That the defendant is liable for the damages to said sheep under provisions of Section 8-812, R.C.M. 1947.

20. That the defendant is liable for the loss suffered by plaintiff for the reason that the defendant's negligent acts and omissions proximately caused the plaintiff's loss.

21. That the plaintiff is entitled to judgment against the defendant in the sum of \$4,051.00 (or any other sum) together with interest thereon at

¹Findings of Fact and Conclusions of Law.

the rate of 6% from June 29, 1949, until paid and for his costs of suit.

The Court erred in not concluding:²

22. That defendant was not negligent as charged in plaintiff's complaint or otherwise.

23. That plaintiff is bound by the terms of the Uniform Livestock Contracts entered into between plaintiff and defendant.

24. That plaintiff's damage was the result of the inherent vice, weakness and natural propensity of the sheep themselves, the change of weather to which said sheep was subjected and the climatic conditions of heat and cold existing during the course of the transportation which were risks assumed by plaintiff.

25. That plaintiff is not entitled to recover from defendant in any sum.

The Court erred:

26. In entering a judgment for plaintiff against the defendant in the sum of \$4,051.00, principal (or in any other sum) and for interest in the sum of \$382.14 (or in any other sum) and in taxing costs against the defendant in the sum of \$67.72 (or in any other sum).

27. In denying defendant's motion requiring plaintiff to make the complaint more certain.

²Defendant's Request for Findings of Fact and Conclusions of Law.

Designation of Record

Appellant hereby designates the entire record as certified by the Clerk of the United States District Court, excepting Exhibits 1 and 2 attached to defendant's answer and excepting all original Exhibits certified by said Clerk and transmitted by order of the United States District Court, to be printed by the above-entitled Court and declares that the entire record is the record relied on by the Appellant herein on this appeal.

/s/ T. B. WEIR,

/s/ NEWELL GOUGH, JR.,

/s/ E. S. MATSON,

Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 14, 1951.

United States
Court of Appeals
For the Ninth Circuit

GREAT NORTHERN RAILWAY COMPANY,
a corporation,

Appellant,

vs.

GEORGE M. MELTON,

Appellee.

Brief of Appellant

T. B. WEIR

E. K. MATSON

NEWELL GOUGH, JR.

Attorneys for Appellant

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NO. 12903

United States
Court of Appeals
For the Ninth Circuit

GREAT NORTHERN RAILWAY COMPANY,
a corporation,

Appellant,

VS.

GEORGE M. MELTON,

Appellee.

Brief of Appellant

I. JURISDICTION

This case was brought by appellee, a citizen resident of the State of Montana, in the United States District Court for the District of Montana against appellant, a Minnesota corporation, for damages suffered by a shipment of sheep over appellant's line of railroad from Kevin, Montana to Wickes, Montana (Tr. pp. 3, 11, 18, 19). The matter in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00 (Tr. pp. 3-11). The jurisdiction of the United States District Court is thereby established pursuant to the provisions of Section 1332 of Title 28, U.S.C.A.

II. STATEMENT OF THE CASE

On May 30, 1949, appellee, the owner of a band of sheep consisting of 1010 ewes, 920 lambs and 74 bucks, loaded said sheep into eight stock cars of appellant Railway Company. The sheep were to be transported by appellant over its line of railroad and delivered to appellee at Wickes, Montana. Said shipment of sheep departed from said Kevin, Montana on May 30, 1949, and was thereafter, and on May 31, 1949, delivered by appellant to appellee at said Wickes, Montana (Tr. pp. 19, 109, 127 Exs. 6, 7). Thereafter a suit for damages was brought by appellee against appellant alleging that appellee suffered damage arising out of said shipment in the sum of \$4,051.00. The basis of this claim for damages was alleged to be the failure of appellant to perform its duty in the prem-

ises and to carelessly and negligently handle said shipment of sheep (Tr. p. 4). As a result of this alleged negligence of appellant, it is alleged that the sheep became bruised, injured, trampled and suffocated, as a consequence of which 58 ewes died, 149 lambs died, 170 ewes became sick and unable to nurse their lambs and 154 lambs became motherless (Tr. pp. 4 and 5). The sheep were valued at \$28.00 per pair, a "pair" being a ewe and a lamb (Tr. pp. 59, 89). Freight charges in the sum of \$600.00 were paid by appellee to appellant to cover the cost of this shipment.

Appellant answered by way of a general denial and also asserted, as an affirmative defense, the provisions of the Uniform Livestock Contract entered into between the parties (Tr. pp. 10-17) the particular provisions considered applicable being Sec. 1(a) and Sec. 1(b) dealing with exempting the carrier from liability unless caused by its own negligence for damage to livestock resulting from an act of God, inherent vice, weakness, or natural propensity of the animal, over-loading, crowding, suffocation, fright, heat or cold, or changes in weather; and Sec. 4, providing that the shipper at his own risk shall load and unload the livestock (Tr. pp. 13, 14). Appellant in its answer further alleged that the sheep had been driven in rain prior to loading at Kevin, that said shipment was wet when loaded, that the ewes and lambs lost the scent of each other as a result of being wet, that said sheep were not properly mothered when loaded, and

that appellee insisted on loading the sheep, although wet and without proper sorting. Further, appellant alleged that appellee was present and in charge of loading operations and assumed the risk of loading the sheep in a wet condition, and that said sheep were transported through rain during their journey and that appellee knew the possible effect of rain upon the shipment, which is an ordinary risk of shipping livestock. Further, appellant alleged that the livestock cars furnished were the standard cars, properly sand-ed for use by sheep and that as a result of the wet sheep being loaded and the rain occurring thereafter, the sand, manure and water mixed in the cars to form a mass with which said sheep became covered without the fault of appellant (Tr. pp. 10-17). The case was thereafter tried to the Court without a jury, resulting in a judgment for appellee (Tr. p. 25).

III. SPECIFICATIONS OF ERROR

Specification of Error No. 1

The Court erred in finding that there was no consideration for the special contract limiting defendant's statutory liability (Tr. p. 184).

Specification of Error No. 2

The Court erred in finding that defendant accepted said sheep for carriage over its line as being in apparent good shape and fit to travel over said line to Wickes, Montana (Tr. p. 184).

Specification of Error No. 3

The Court erred in finding that defendant had weather information available to it and knew, or could have known, in the exercise of reasonable care, that more rain and wet conditions were to be expected at the time of shipment (Tr. p. 184).

Specification of Error No. 4

The Court erred in finding that said sheep were all jammed up in the north end of each and every railroad car (Tr. pp. 184, 185).

Specification of Error No. 5

The Court erred in finding that defendant was negligent in accepting for carriage and in transporting to Wickes, Montana, the said shipment of sheep when it knew, or in the exercise of reasonable care, should have known, that it might rain on said sheep during the course of transportation to Wickes, Montana, and that damage to said sheep as a result of such additional rain would occur (Tr. p. 185).

Specification of Error No. 6

The Court erred in finding that defendant was negligent in not properly caring for said sheep or properly inspecting said sheep to determine their condition after they were rained upon during the course of transportation from Kevin, Montana to Wickes, Montana (Tr. p. 185).

Specification of Error No. 7

The Court erred in finding that the damage to the sheep did not occur as a result of any inherent defect, vice, weakness or spontaneous action of the property itself and that the damage caused was not a result of any irresistible superhuman cause (Tr. p. 185).

Specification of Error No. 8

The Court erred in finding that the damage to said sheep was directly proximately caused by defendant's negligent acts and omissions and that such negligent acts and omissions were the proximate cause of plaintiff's loss (Tr. p. 185).

Specification of Error No. 9

The Court erred in finding that at the time of delivery and loading of said freight, said livestock was in good condition (Tr. p. 185).

Specification of Error No. 10

The Court erred in finding that said livestock had no greater value than \$20,000.00 by reason of the negligent manner in which the defendant transported the same (Tr. p. 185).

Specification of Error No. 11

The Court erred in finding that plaintiff sustained loss or damage by reason of defendant's negligence in the sum of \$4,051.00, or in any other sum (Tr. p. 185-6).

Specification of Error No. 12

The Court erred in failing to find that the transportation of said sheep by plaintiff from Kevin, Montana to Wickes, Montana, was subject to the provisions of the Uniform Livestock Contracts entered into between plaintiff and defendant prior to the commencement of the transportation of said sheep and that said contracts were in full force and effect at the time of shipment of said sheep and during the course of the transportation thereof (Tr. p. 186).

Specification of Error No. 13

The Court erred in failing to find that the provisions of said contracts, to-wit, Section 1(a) and (b) and Section 4(a) were in full force and effect and that the plaintiff was bound thereby (Tr. p. 186).

Specification of Error No. 14

The Court erred in failing to find that it is inherent in the nature of sheep, when wet and muddy, to lose their scent of each other, resulting in ewes and lambs being unable to identify each other (Tr. p.186).

Specification of Error No. 15

The Court erred in failing to find that plaintiff was in sole charge of, and responsible for the loading of said sheep at Kevin, Montana, and was liable for any risk incident to loading said sheep in the condition then and there existing, or in the manner or

method of loading (Tr. p. 186).

Specification of Error No. 16

The Court erred in failing to find that no evidence of negligence on the part of the defendant was proved by plaintiff, either as charged in his complaint or otherwise (Tr. p. 186).

Specification of Error No. 17

The Court erred in failing to find that the damage suffered by plaintiff to his said shipment of sheep was a result of the inherent vice, weakness and natural propensity of the sheep themselves, the change of weather to which said shipment of sheep was subjected and the climatic conditions of the heat and cold existing during the course of transportation and these were risks assumed by plaintiff for which defendant was not liable or responsible, being relieved of liability therefor by reason of the provisions of the Uniform Livestock Contracts governing said shipment of sheep (Tr. p. 187).

Specification of Error No. 18

The Court erred in concluding that the special contract between defendant and plaintiff purporting to relieve defendant of its statutory liability is invalid and not binding upon plaintiff for the reason that there is no consideration for such a special contract (Tr. p. 187).

Specification of Error No. 19

The Court erred in concluding that the defendant is liable for the damages to said sheep under provisions of Section 8-812, R.C.M. 1947 (Tr. p. 187).

Specification of Error No. 20

The Court erred in concluding that the defendant is liable for the loss suffered by plaintiff for the reason that the defendant's negligent acts and omissions proximately caused the plaintiff's loss (Tr. p. 187).

Specification of Error No. 21

The Court erred in concluding that the plaintiff is entitled to judgment against the defendant in the sum of \$4,051.00 (or any other sum) together with interest thereon at the rate of 6% from June 29, 1949, until paid and for his costs of suit (Tr. 188).

Specification of Error No. 22

The Court erred in not concluding that defendant was not negligent as charged in plaintiff's complaint or otherwise (Tr. p. 188).

Specification of Error No. 23

The Court erred in not concluding that plaintiff is bound by the terms of the Uniform Livestock Contracts entered into between plaintiff and defendant (Tr. p. 188).

Specification of Error No. 24

The Court erred in not concluding that plaintiff's damage was the result of the inherent vice, weakness and natural propensity of the sheep themselves, the change of weather to which said sheep was subjected and the climatic conditions of heat and cold existing during the course of the transportation which were risks assumed by plaintiff (Tr. p. 188).

Specification of Error No. 25

The Court erred in not concluding that plaintiff is not entitled to recover from defendant in any sum.

Specification of Error No. 26

The Court erred in entering a judgment for plaintiff against the defendant in the sum of \$4,051.00, principal (or in any other sum) and for interest in the sum of \$382.14 (or in any other sum) and in taxing costs against the defendant in the sum of \$67.72 (or in any other sum) (Tr. p. 188).

IV. ARGUMENT

The principal contentions made by appellee in this appeal are: (1) (a) that the evidence in the case did not sustain the Findings and Conclusions of the lower Court that the appellant was negligent in accepting the appellee's sheep for carriage, that the appellant was negligent in caring for said sheep, (1) (b) that the damage to said sheep was not the result of any

inherent defect, vice or weakness of said sheep and that appellant's negligence was the proximate cause of the damage, (2) and that the contract between appellee and appellant was not a valid and binding contract and that appellant was liable under the provisions of Section 8-812, R.C.M. 1947.

- (1) (a) *Evidence Does Not Sustain Findings of Negligence.* Specifications of Error numbered 2, 3, 4, 5, 6, 8, 9, 10, 11, 16, 19, 20, 21, 22, 26.

The District Court in its Findings (V, VI, Tr. pp. 21, 23) has found the appellant to be negligent in accepting for carriage and transporting appellee's sheep. The appellant introduced in evidence the record of the complete movement of the shipment of sheep during the time it had custody of said sheep. That movement was shown by appellant's witnesses to be as follows:

The shipment departed from Kevin, Montana on May 30, 1949, at 3:50 P. M.; arrived at Shelby, Montana on May 30, 1949 at 4:45 P. M.; departed from Shelby at 6:30 P. M. May 30th and arrived at Great Falls at 12:45 a. m., May 31st, 1949; departed from Great Falls at 4:55 A. M., May 31st and arrived at Wickes at approximately 10:30 A. M. on May 31st (Tr. pp. 125, 126, 127, 129, defendant's Exhibits 6 and 7)—a distance of 242.6 miles (Exs. 6, 7).

Appellant produced as witnesses each one of the conductors in charge of the trains that moved these sheep and each one of the conductors produced, and

there was introduced in evidence, his delay report covering the record of the movement of which he was in charge (defendant's Exhibits 8, 9, 11, 13).

Conductor Veach was in charge of the train moving the sheep from Kevin to Shelby (Tr. p. 136). There was no rough handling or any sudden stop during this portion of the journey and no switching was performed with the sheep. (Tr. p. 139). The sheep were connected next to the engine (Tr. p. 140) and were inspected at Shelby (Tr. p. 140) where nothing was found wrong with the sheep (Tr. p. 140).

Conductor Larson was in charge of the train carrying the sheep from Shelby to Great Falls (Tr. p. 142). During this portion of the journey there was no rough handling or any sudden stop (Tr. p. 146) and no switching was performed with the sheep (Tr. p. 145). Again the sheep were transported next to the engine (Tr. p. 147). This train was inspected at Shelby (Tr. p. 145), at Conrad (Tr. p. 144) and at Vaughan (Tr. p. 147) and no irregularities were noted (Tr. p. 147).

Conductor Marceau was in charge of the train from Great Falls to Wickes (Tr. p. 148). During this portion of the journey the sheep were placed within seven cars of the head end of the train (Tr. p. 149). There was no rough handling or any sudden stop during this movement (Tr. p. 154). This train was inspected at Cascade, Wolf Creek, and Helena (Tr. pp. 150, 151). Nothing was found wrong with the shipment during these inspections (Tr. pp. 150 and 151). The

train arrived at Wickes at 10:30 A. M. on May 31, 1951 (Tr. p. 129).

Brakeman Lukasik performed inspections of the train between Great Falls and Wickes and found the sheep to appear normal (Tr. pp. 158 and 159).

After arrival of the train at Wickes, the 8 loads of sheep were placed on the stockyard spur (Tr. p. 152) by the train moving the sheep from Great Falls to Wickes.

Conductor Ewinski in charge of the local train which arrived at Wickes at 11:50 A. M., May 31, 1949, unloaded the sheep (Tr. pp. 161, 162, 163). One car had been unloaded prior to the arrival of this local train (Tr. p. 163). The unloading of the remaining 7 cars was accomplished within 45 to 50 minutes (Tr. p. 163).

At the time of unloading these sheep at Wickes, there were only 3 lambs, 3 ewes and 1 or 2 bucks, dead (Tr. pp. 59, 104). Such a death loss was not considered abnormal for such a shipment (Tr. p. 87).

The evidence is conclusive that these sheep were wet upon arrival at their destination, Wickes, Montana (Tr. pp. 71, 107, 164). There is a conflict in the testimony as to whether or not the sheep were wet when loaded; however, the District Court has found that the sheep had been subjected to rain and muddy conditions prior to loading, but that appellee judged said sheep had dried sufficiently so that they could be safely loaded and transported (Tr. pp. 21, 22). The cars furnished for this shipment are shown to have

been standard cars, sanded and in condition for use (Tr. p. 116). During the course of the movement of this shipment, this shipment of sheep was rained upon and became wet (Finding V, Tr. p. 22, Defendant's Ex. 14, Tr. p. 179). As shown by the evidence submitted by appellant, there was no negligent handling of this shipment, nor any negligent delay in transporting the sheep. Appellee contends that there was a delay in unloading the sheep at Wickes, awaiting the arrival of the local train (Tr. p. 47). There is no evidence, however, that this delay was unreasonable or that it contributed in any way to the damage suffered by the sheep, and the lower Court in its Findings did not find that there was any negligent delay in unloading at Wickes (Tr. pp. 18 to 25).

The loading of the sheep was under the control of appellee. He was the judge as to whether or not it was safe to make the shipment (Tr. p. 62). Appellee and his witness, Thomas, who assisted with the loading of the sheep, both stated that they considered the sheep had become sufficiently dry so that it would be safe to load and ship them (Tr. pp. 63, 64, 89, 94).

Appellant, however, was found by the lower Court to have been negligent in accepting the sheep for carriage (Tr. p. 23). We submit that the evidence does not justify any such Finding and that it is not possible to say that appellant did not exercise ordinary care in accepting this shipment when appellee and his witness, Thomas, both experienced sheep men, con-

sidered that it was safe to load the sheep on the stock cars.

The Court further found that it was negligent of appellant not to have known that it might rain on the sheep during the course of their transportation (Tr. p. 23). We submit that such finding is in error and places a burden upon the carrier far beyond the requirements of reasonably prudent action. The appellant was obligated to accept this shipment unless it knew, or could reasonably anticipate that it could not discharge its obligation of transporting the sheep from Kevin to Wickes. It did not fail in its obligation of transporting the sheep, but made delivery expeditiously to appellee at Wickes.

The universal rule as to the liability of a common carrier of livestock is stated in 13 C.J.S., page 155, Sec. 79b:

“A carrier is not an insurer of live stock delivered to it for transportation, for it does not absolutely warrant such freight against the consequences of its own vitality, and if there is loss or injury due to the peculiar nature and propensities of the animals, the carrier is not liable, unless the loss or injury could have been prevented by the exercise of reasonable foresight, vigilance, and care on its part. The carrier is relieved from liability from such causes, if he has provided suitable means of transportation and exercised that degree of care which the nature of the property requires, or has not otherwise contributed to the injury. *This rule prevails at common law and no special contract limiting the carrier's liability in respect to injuries re-*

sulting to animals from such causes is necessary."
(Italics ours).

Sec. 8-702, R.C.M. 1947, provides as follows:

"Obligation to accept freight. A common carrier must, if able to do so, accept and carry whatever is offered to him, at a reasonable time and place, of a kind that he undertakes or is accustomed to carry."

See: 9 Am. Jur. Sec. 292, p. 611.

The case of Wahle, et al. vs. G. N. Ry. Co. (1910) 41 Mont. 326, 109 Pac. 713, involved a question of whether or not a carrier was negligent in accepting a shipment when it did not have, or could reasonably anticipate that it would not have, facilities to discharge its obligation. In that case the Montana Court held the defendant liable because it failed to prove that at the time of its acceptance of the shipment that it could not, by the use of ordinary care, have known or anticipated that it could not discharge the obligation assumed. In that case, however, the evidence established conclusively that the carrier knew of the existence of an abnormal condition. Severe floods had caused damage to the rail line which had not been completely repaired, heavy rains were threatening portions of the line and causing damage. Another rail carrier in the same territory had already been forced to discontinue part of its operations. In the case presented by this appeal, there is no evidence or any suggestion made of any such abnormal condition which would justify appellant in refusing to accept appellee's shipment of sheep.

Although the District Court found that appellant had weather information available to it, and knew, or could have known, in the exercise of reasonable care, that more rain and wet conditions were to be expected, (Tr. p. 22) we submit that there is no evidence in this record to support such a finding. There is not even a suggestion made as to the probable weather conditions which would exist during the course of the transportation. There is evidence in the record, by the statements of witnesses and by documentary proof, as to what the weather conditions actually were during the time this shipment was being moved by appellant (Tr. pp. 67, 89, Exhibits Nos. 6, 7, 14). Appellant introduced by its Exhibit 14 (Tr. p. 179) a weather chart for Montana prepared by the United States Weather Bureau, covering the dates May 30th and May 31st, 1949. This exhibit was not, however, a weather prediction for those dates. The rain through which this shipment passed was not abnormal in any respect. It was a normal spring rain and certainly not of such severity to justify appellant refusing to render transportation service. The possible weather conditions were as well known and as available to appellee as to appellant. And appellee considered the conditions proper to load and transport the sheep (Tr. pp. 41, 63, 64). We therefore contend that there is no evidence to justify finding appellant negligent on the basis that it accepted said sheep when it knew that it might rain during the course of their transportation. To so hold, in effect makes appellant respon-

sible for each and every rain storm through which it may be transporting sheep, and further makes it responsible for knowing what weather conditions shall be during the course of transportation of a shipment of sheep. It seems to us that the Court's Findings and Conclusions (Tr. pp. 22-24) *are in effect holding that appellant was negligent because on May 30th and 31st, 1949, it rained in a portion of the State of Montana.*

(1) (b) *Damage to Sheep Was the Result of the Inherent Defect of the Animal.* Specifications of Error Numbered 7, 14, 17, 19, 24, 26.

It is the contention of appellant that the District Court erred in its Finding (VII, Tr. p. 23) to the effect that the damage to the sheep was not a result of any inherent defect, vice, weakness or spontaneous action of the sheep themselves. This wording is taken from Sec. 8-812, R.C.M. 1947.

The evidence on this particular point, we feel, establishes conclusively that when sheep become wet and muddy or dirty, it will cause them to lose their scent of each other, resulting in ewes being unable to recognize their lambs. Such a circumstance is one of the natural weaknesses of the sheep, an inherent defect or vice for which a carrier is not responsible.

The lower Court found that the sheep involved had been wet prior to loading but that appellee judged said sheep to have dried sufficiently that they could be loaded and transported (Tr. pp. 21-22). The Court

did not find that the sheep were dry when loaded and although there is a conflict in the evidence as to whether or not they were dry, the evidence is to the effect that these sheep were at least damp (Tr. p. 62). There is a danger incident to loading wet sheep, as stated by appellee, his witness, Thomas, and the veterinarian Nordell (Tr. pp. 62, 95 and 174). Appellee delayed loading the sheep at Kevin because he was concerned that it might rain on them (Tr. pp. 64, 181). During their journey the sheep became wet by reason of rain through which they passed (Tr. p. 22). As a result of the sheep becoming wet and muddy from the cars, their scent of each other was lost. This, we contend, is established by the evidence as being a natural weakness, vice, propensity and inherent defect of the animal. Appellee so testified (Tr. pp. 50, 62, 78, 87). The veterinarian Nordell so testified (Tr. p. 175). Sheep are peculiar and stupid animals (Tr. pp. 73, 173) and are easily subject to fright (Tr. p. 174) which is also an inherent weakness of a sheep (Tr. p. 175). Sheep which have become wet during shipment will develop some stiffness (Tr. p. 173) and wet sheep will jam up and are cold (Tr. p. 95).

These results, however, are not due to any negligence on the part of a carrier but are, we submit, an inherent weakness of the animal. The damages incurred here resulted from one cause only—the sheep were wet or became wet. After becoming wet, damage resulted, not from negligence or act of the carrier—but from the inherent weakness of that sheep;

a condition for which the carrier is not liable.

Section 8-812, R.C.M. 1947, provides as follows:

“Liability of inland carriers for loss. Unless the consignor accompanies the freight and retains exclusive control thereof, an inland common carrier of property is liable, from the time that he accepts until he relieves himself from liability, pursuant to sections 8-414 to 8-417, for the loss or injury thereof from any cause whatever, except:

1. An inherent defect, vice, weakness, or a spontaneous action of the property itself;
2. The act of a public enemy of the United States, or of this state;
3. The act of the law; or,
4. An irresistible superhuman cause.”

This section of the Montana statutes is a statement of the common law rule. There have been few cases in Montana interpreting this section.

In the case of *Nelson vs. Great Northern Ry. Co.* (1903) 28 Mont. 297, 72 Pac. 642, the Montana Court recognized the common law rule that if sheep, while being transported, died or were injured from some inherent want of vitality, or by reason of injuries inflicted upon each other, or by an unavoidable accident, the carrier would not be liable.

It has long been settled that a carrier is not responsible for damage to livestock by reason of its inherent nature or infirmity or propensities. And it is also generally held that a carrier is not responsible for damage to livestock resulting from changing weather conditions.

The reason for such a rule is stated in *Jordan v.*

Chicago, Burlington & Quincy R. Co. (Mo.) 1920, 226 S. W. 1023, at page 1027:

“Now, a carrier is not liable for the bad condition of live stock at the end of a journey, unless such bad condition is the result of some negligence on the part of the carrier. As a necessary and natural incident to a long journey, live stock become ‘weak, dauncy, hungry and lank’. They are the natural results of long trips in cold and snowy weather, even where there is no negligence either of delay or in handling. And for such results, in the absence of negligence, the carrier is not liable. 10 C. J. 122. Neither is it liable for loss or injury on account of a mere want of vitality, sickness, restlessness, or vicious propensities of live stock. 10 C.J. 123, 124; Cunningham v. Wabash R. Co., 167 Mo. App. 273, 282, 149 S. W. 1151; Jackson v. Chicago, etc., R. Co., 34 S. D. 153, 147 N. W. 732, 733.”

See 13 C.J.S. Sec. 79b at page 155, *supra*, page 14.

The general rule is stated in 13 C.J.S., Sec. 79, at page 158, as follows:

“A carrier of live stock is not liable for injuries caused by changing weather conditions. In the absence of some negligence or misfeasance on the part of the carrier or its servants, the carrier is not liable for loss or injury to animals occasioned by excessive heat or cold. This is a risk assumed by the shipper.”

Coupland v. Housatonic R. Co. (Conn.) 1892, 23 Atl. 871-872:

“The common-law rule which made carriers practically insurers of property while being carried by them has, however, from the very necessity of the case, been in a measure relaxed in the carriage of livestock. As suggested in Edw.

Bailm. Sec. 680, the carrier can store away goods, so as to secure their safety; but a carrier of animals by a mode of conveyance opposed to their habits and instincts has no such means of securing absolute safety. They may die of fright; they may, notwithstanding every precaution, destroy themselves in attempting to break away from the fastenings by which they are secured; or they may kill each other by crowding, plunging, or goring; the motion of the cars, their frequent concussions, the scream of the engines may often create a kind of frenzy in the swaying mass of cattle; and the carrier is not held liable for injuries or losses arising from the irrepressible instincts of this living freight which he could not prevent by the exercise of reasonable care."

Bragg v. Payne (Mo.) 1921, 235 S. W. 148:

"This shipment, it must be remembered, was one of live stock, and under the common-law rule, if the property transported was damaged by reason of its inherent nature or infirmity, and without fault on the part of the carrier, the latter was not liable, all of which is peculiarly applicable to live stock because of their vitality, natural infirmities and inherent propensities."

See also:

9 Am. Jur. Sec. 747, p. 880.

Cleve vs. Chicago, Burlington & Quincy R. Co. (Neb.) 1909, 120 N.W. 959.

Winn v. American Express Company (Iowa) 1913, 140 N.W. 427.

Washington Horse Exchange v. Louisville & N. R. Co. (N.C.) 1916, 87 S. E. 941.

Under the early Montana decisions the burden was placed upon the carrier to establish by a preponderance of the evidence that death or injury to live stock

was occasioned by some cause other than the carrier's negligence. (Nelson v. G.N.Ry. Co. (1903) 28 Mont. 297, 72 Pac. 642; Wahle, et al v. G.N.Ry. Co. (1910), 41 Mont. 326, 109 Pac. 713). In the case presented by this appeal, we feel that such a preponderance of evidence has been established as shown by the evidence heretofore referred to.

Nevertheless we think it advisable to call the Court's attention to the more recent cases from other jurisdictions which have modified that rule. One of the leading cases on this particular point is:

Southern Pac. Co. v. Itule (Ariz.) 1937, 74 Pac. (2d) 38, p. 40:

"The appeal raises a question of law in regard to the extent of the liability of a carrier for perishable articles, such as fruit and vegetables, which has never been determined in this jurisdiction. Under the common law, every carrier receiving goods in good condition for carriage, and delivering them in bad condition, was presumed to have been negligent in their transportation, and was liable for the damages caused by its negligence. There were four, and only four, defenses which might be raised by the carrier under such circumstances, these being that the injury was caused by (a) an act of God, (b) the public enemy, (c) the act of the shipper, or (d) the inherent nature of the goods themselves. It is sometimes said that the basis of the carrier's liability for the loss or damage to goods in transit was presumed negligence, but this, strictly speaking, is erroneous, since it cannot be rebutted. The rule is really one of substantive law, to the effect that the carrier is an insurer of the safe transportation of goods entrusted to its

care, unless the loss or damage is due to one of the four specified causes (citing cases). Since these four defenses are affirmative ones, the burden of proof was on the carrier to show that the injury was caused in one of these four manners, and in the absence of affirmative and satisfactory evidence to that effect, following the rule in all cases where the burden of proof is with one or the other party on a given issue, it was the duty of the trial court to instruct the jury that the carrier had not met the burden imposed on it. The older cases are very strict in regard to the necessity of the carrier establishing affirmatively the true cause of the injury, if it desired to escape liability. There was, however, even then, one apparent exception to this rule, and that was when the goods transported were livestock. It was held that, due to the peculiar nature and propensity of animals, the carrier should not be liable for injury thereto, if it had provided suitable means of transportation and exercised the degree of care which the nature of the property required, and had not otherwise contributed to the injury. According to the weight of authority in such cases, therefore, it was generally held that, if the carrier showed that it had provided the proper means of transportation and had exercised that degree of care in transporting the property which its nature requires, it did not need to go further and make a specific showing that the injury was actually caused by one of the four reasons allowed as a defense to the action. 10 C. J. p. 123, and cases cited.

“We think this apparent exception to the general rule is, in reality, only a recognition of the different quantum of evidence required to establish the same defense under different circumstances. It is a well-known fact that the majority

of inanimate objects, when they are delivered to the carrier in good condition, will almost invariably remain in the same state until they reach the consignee at the end of the route, in the absence of some human instrumentality which injures them. Such being the case, it is but reasonable that, in case such objects arrived in a damaged condition, the carrier should prove affirmatively the damage was caused by one of the four things above set forth, since they were the only matters which released it from the obligation of an insurer imposed on it by public policy. For instance, a plate glass mirror, which is in good condition, will remain so indefinitely unless injured by an act of God or some human violence applied thereto directly or indirectly. And, since the carrier is in the exclusive possession of the goods during their carriage, it is in the best position of any one to show affirmative the real cause of the damage. It is apparent, however, that animate objects, such as livestock, are in an entirely different category. They may be injured, or even killed, by acts arising out of their own inherent nature and unaccompanied by any human agency or negligence. Even with the best of care on the part of all who come in contact with them during the shipment, they often fail to arrive at their destination in good condition. *The apparent exception is merely a recognition of this fact, and, if the carrier proves the exercise of due care on its part, the natural presumption is that the damage was caused by the nature of the animals, and not by any human agency.*" (pp. 40-41).

The Texas Court in *Panhandle & S. F. Ry. Co. v. Wilson* (1939), 135 S.W. (2d) 1062, stated:

"Whatever may be the present status of the rule of law which makes a common carrier an

insurer of goods received by it for transportation, and regardless of what the rule may be with reference to the exceptions in case of shipments of livestock, it is well established law in this state that when the presumption of negligence arises it devolves upon the carrier to show by testimony there was no negligence on its part in connection with the shipment. When the plaintiff establishes the presumption by showing a delivery of the livestock to the carrier; that they were in good condition when delivered, and that they were received at their destination in a damaged condition, the plaintiff has made a *prima facie* case and shifted to the carrier the burden of exonerating itself from negligence (citing cases).

"If the testimony stops there and the carrier adduces no evidence of the manner in which the shipment was handled by it, the plaintiff is entitled to recover. But the rule is equally as well established that, when the case reaches that stage and the burden is thus shifted to the carrier, it adduces legal evidence of the manner in which the shipment was handled and shows by competent evidence that nothing was done or allowed to happen during the time it had possession of the property that could be classed as negligence, it exonerates itself from liability and thus discharges the burden so placed upon it. The *prima facie* case made by the plaintiff is then destroyed and the duty devolves upon him to proceed further and establish the case made by his pleadings by showing in some manner that the injury and damage resulted from the carrier's negligence."

To the same effect, see *Illinois Central R. Co. vs. Rouw & Company* (Tenn.) 1940, 159 S. W. (2) 839.

Appellant here maintains that in a case such as the one here presented where the carrier has exer-

cised all proper care and foresight it may be reasonably required to exercise, it would be most unreasonable to charge him with the loss suffered when there is no evidence whatsoever of negligence and the carrier has established that the cause of the loss resulted from an inherent weakness of an animal (in this case a sheep) after they had become wet from an ordinary Spring rain.

2. *Validity of Contract.* Specifications of Error numbered 1, 12, 13, 15, 18, 23, 25, 26.

At the time appellee delivered the shipment of sheep to appellant at Kevin, Montana on May 30, 1949, the parties entered into contracts covering the carriage of these animals. Those contracts (known as Uniform Livestock Contracts) were introduced in evidence by appellee as his Exhibits Nos. 1 and 2 (Tr. p. 44). There is no question about the execution and delivery of the contracts. The two contracts were identical in terms and each contained the following provisions:

“Sec. 1(a). Except in the case of its negligence proximately contributing thereto, no carrier or party in possession of all or any of the livestock herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, the inherent vice, weakness, or natural propensity of the animal, or the act or default of the shipper or owner, or the agent of either, or by riots, strikes, stoppages of labor or threatened violence.

“(b) Unless caused by the negligence of the carrier or its employees, no carrier shall be liable

for or on account of any injury or death sustained by said livestock occasioned by any of the following causes: Overloading, crowding one upon upon another, escaping from cars, pens or vessels, kicking or goring or otherwise injuring themselves or each other, suffocation, fright, or fire caused by the shipper or the shipper's agent, heat or cold, changes in weather or delay caused by stress of weather or damage to or obstruction of track or other causes beyond the carrier's control.

"Sec. 4(a). The shipper at his own risk and expense shall load and unload the livestock into and out of cars, except in those instances where this duty is made obligatory upon the carrier by statute or is assumed by a lawful tariff provision. * * *"

The lower Court by its Conclusion No. II (Tr. p. 24) decided that the special contract between the parties here purporting to relieve the appellant of its statutory liability was invalid and not binding upon appellee for the reason that there was no consideration for such special contract.

The Court in its Finding No. IV (Tr. p. 21) found that the \$600.00 freight charges paid by appellee to appellant was the ordinary and usual rate for this shipment and that there was no consideration for the special contract limiting appellant's statutory liability.

Section 8-707, R.C.M. 1947, provides as follows:

"Obligations of carrier altered only by agreement. The obligations of a common carrier cannot be limited by general notice on his part, but may be limited by special contract."

The Montana Court has upheld the right of a carrier to make a special contract.

Nelson v. G. N. Ry. Co., 28 Mont. 297, 72 Pac. 642;

Rose v. Northern Pacific, 35 Mont. 70, 88 Pac. 767.

The Uniform Livestock Contract form used for this shipment is one which has been in use for many years. The form was prepared to conform to the provisions of Title 20, U.S.C.A., Sec. 20 (11). There is no attempt by the carrier to relieve itself from the consequences of its own negligences, and the District Court has so found (Tr. p. 21). There is no assertion made that the contract is void because of unreasonableness, it being held invalid on one ground only—that there was no consideration.

The consideration for this contract was the \$600.00 freight charge paid by appellee to appellant. The basis of rates upon which that charge was made was computed for transportation *under the terms of this contract*. *The \$600.00 freight charge was the rate to be paid for shipment with the provisions in the contract limiting the liability of the appellant.*

Appellee introduced these contracts in evidence (Tr. p. 44). Appellee introduced no evidence concerning lack of consideration for the contracts. Appellee apparently considered the terms of the contracts as binding, as evidenced by his efforts to show that the sheep were in “apparent good order” as stated in the contracts (Tr. p. 45).

The Montana Court decided this question in 1907. In Rose v. Northern Pacific Railway Co., 35 Mont. 70,

88 Pac. 767, the Court had for decision the question of consideration for a special contract under the Montana law. The exact question was whether or not a passenger ticket stating that it was sold at a reduced rate was sufficient consideration for limiting the carrier's liability for baggage carried. The Court there said.

“This ticket constituted a contract between the Northern Pacific Railway Company and Mrs. Rose for the transportation of herself and her baggage from Butte to Omaha. (6 Cyc. 570). It must be conceded that the reduced price at which the ticket was sold is sufficient consideration for any contract which the company might lawfully make respecting the transportation of the passenger or her baggage. It is not necessary that there should have been a special or independent consideration for every separate paragraph or provision of the contract, for the consideration of the contract itself is a consideration for every provision in it. In other words, the ticket containing these 11 provisions, with the introductory clause quoted above, constitutes one entire contract. In *Cau v. Texas & Pacific Ry. Co.*, 194 U.S. 427, 24 Sup. Ct. 663, 48 L. Ed. 1053, it is said: ‘It is again urged that there was no independent consideration for the exemption expressed in the bill of lading. This point was made in *York Co. v. Central Railroad*, 3 Wall. (U.S.) 107, 18 L. Ed. 170. In response it was said: “The second position is answered by the fact that there is no evidence that a consideration was not given for the stipulation. The company, probably, had rates of charges proportioned to the risks they assumed from the nature of the goods carried, and the exception of losses by fire must neces-

sarily have affected the compensation demanded. Be this as it may, the consideration expressed was sufficient to support the entire contract made." *In other words, the consideration expressed in the bill of lading was sufficient to support its stipulations.'*

But it is said that the recital that the ticket was sold at a reduced rate was only prima facie evidence of the fact, and therefore the court should not have excluded the testimony offered. *It is sufficient answer to say that no effort was made to show that in fact the ticket was not sold at a reduced rate.'*

And at page 769, the Court further stated:

"But it is contended that Mrs. Rose was not aware of the terms of paragraph 8 of the ticket, as set forth above, and that in any event she should have been accorded the opportunity to determine for herself whether she would accept this ticket with its limitation as to the value of her baggage or procure another kind of ticket by which she might have held the carrier for its full value. We do not think there is any merit in either of these contentions. The limitation mentioned in paragraph 8 was made by a plain provision on the face of the ticket, and the ticket was signed by Mrs. Rose. *In the absence of fraud, a party to a written contract cannot be heard to say that he did not know or understand its contents.* In *Cau v. Texas & Pacific Ry. Co.*, above, it is said: 'There can be no limitation of liability without the assent of the shipper (*New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. (U.S.) 344, 12 L. Ed. 465); and there can be no stipulation for any exemption by a carrier which is not just and reasonable in the eye of the law (*Railroad Co. v. Lockwood*, 17 Wall. (U.S.) 357, 21 L. Ed. 627; *Bank of Kentucky v. Adams Express Co.*, 93 U.S. 174, 23 L. Ed. 872). Inside

of that limitation, the carrier may modify his responsibility by special contract with a shipper. *A bill of lading limiting liability constitutes such a contract, and knowledge of the contents by the shipper will be presumed.* See, also, Section 2204 of the Civil Code.

The second contention is likewise disposed of by the decision in the *Cau* case. It is said: 'It is well settled that the carrier may limit his common-law liability. *York Co. v. Central Railroad*, 3 Wall. (U.S.) 107, 18 L. Ed. 170. But it is urged that the contract must be upon a consideration other than the mere transportation of the property, and an "option and opportunity must be given to the shipper to select under which (the common-law or limited liability) he will ship his goods." If this means that a carrier must take no advantage of the shipper or practice no deceit upon him, we agree. If it means that the alternative must be actually presented to the shipper by the carrier, we cannot agree. From the standpoint of the law the relation between carrier and shipper is simple. Primarily the carrier's responsibility is that expressed in the common law, and the shipper may insist upon the responsibility. *But he may consent to a limitation of it, and this is the "option and opportunity" which is offered to him.*'"

The United States Supreme Court cases upon which the *Rose* case, *supra*, is based, are:

Cau v. Texas, etc., Ry. Company, 194 U.S. 427, 24 Sup. Ct. 663, 48 L. Ed. 1053;

York Manufg. Co. v. Ill. Cent. R. R. Co., 3 Wall. 107, 18 L. Ed. 170.

In the *York* case, the United States Supreme Court said at page 172:

"The owner of the goods may rely upon this responsibility imposed by the common law, which

can only be restricted and qualified when he expressly stipulates for the restriction and qualification. But when such stipulation is made, and it does not cover losses from negligence or misconduct, we can perceive no just reason for refusing its recognition and enforcement.

We do not understand that the counsel of the plaintiff in error questions that the law is as we have stated it to be. His positions are that the agents of the plaintiff at Memphis, who made the contract with the Illinois Central Railroad Company, were not authorized to stipulate for any limitation of responsibility on the part of that Company; and that no consideration was given for the stipulation made.

The first of these positions is answered by the fact that it nowhere appears that the agents disclosed their agency when contracting for the transportation of the cotton. So far as the defendant could see, they were themselves the owners.

The second position is answered by the fact, that there is no evidence that a consideration was not given for the stipulation. The Company, probably, had rates of charges proportioned to the risks they assumed from the nature of the goods carried; and the exception of losses by fire must necessarily have affected the compensation demanded. Be this as it may, the consideration expressed was sufficient to support the entire contract made.

In the *Cau* case, the Court had this exact question under consideration. The Court there said at page 1056:

“It is well settled that the carrier may limit his common-law liability. *York Mfg. Co. v. Illinois C. R. Co.*, 3 Wall. 107, 18 L. Ed. 170. But it

is urged that the contract must be upon a consideration other than the mere transportation of the property, and an 'option and opportunity must be given to the shipper to select under which, the common-law or limited liability, he will ship his goods.'

"If this means that a carrier must take no advantage of the shipper, or practice no deceit upon him, we agree. If it means that the alternative must be actually presented to the shipper by the carrier, we cannot agree. From the standpoint of the law the relation between carrier and shipper is simple. Primarily the carrier's responsibility is that expressed in the common law, and the shipper may insist upon the responsibility. But he may consent to a limitation of it, and this is the 'option and opportunity' which is offered to him. What other can be necessary? There can be no limitation of liability without the assent of the shipper (*New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 12 L. Ed. 465), and there can be no stipulation for any exemption by a carrier which is not just and reasonable in the eye of the law (citing cases).

Inside of that limitation, the carrier may modify his responsibility by special contract with a shipper. A bill of lading limiting liability constitutes such a contract, and knowledge of the contents by the shipper will be presumed.

It is again urged that there was no independent consideration for the exemption expressed in the bill of lading. This point was made in *York Mfg. Co. v. Illinois C. R. Co.*, 3 Wall. 107, 18 L. Ed. 170. In response it was said: 'The second position is answered by the fact that there is no evidence that a consideration was not given for the stipulation. The company, probably, had rates of charges proportioned to the risks they assumed from the nature of the goods carried, and the

exception of losses by fire must necessarily have affected the compensation demanded. Be this as it may, the consideration expressed was sufficient to support the entire contract made.'

In other words, the consideration expressed in the bill of lading was sufficient to support its stipulations. This effect is not averted by showing that the defendant had only one rate. It was the rate also of all other roads, and presumably it was adopted and offered to shippers in view of the limitation of the common-law liability of the roads."

The same Court also stated in *Hart v. Pennsylvania R. R. Co.*, 112 U.S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, at page 720:

"It must be presumed, from the terms of the bill of lading and without any evidence on the subject, and especially in the absence of any evidence to the contrary, that, as the rate of freight expressed is stated to be on the condition that the defendant assumes a liability to the extent of the agreed valuation named, the rate of freight is graduated by the valuation."

Applying the rules as set forth in the authorities immediately preceding, we submit that there can be no question but that the consideration set forth in the contracts and paid was a sufficient consideration to support the contracts, and that they were valid.

If the cause of appellee's damage was the natural weakness of the animals, as heretofore contended, the question of whether or not the livestock shipping contracts are valid, is immaterial. Under the Montana Statutes, Sec. 8-812, *supra*, and the common law as shown by the citations, *supra*, the carrier is relieved

from liability from such cause.

The contracts, in addition, however, by Sec. 1(b) thereof, supra, also relieve appellant from liability for damages caused by overloading, crowding, injuring themselves and each other, suffocation, fright, heat or cold, and changes in the weather. We contend that appellee is bound by the terms of those contracts and if changes in the weather, or heat or cold, caused the damage to the sheep, then appellant is not liable therefor. We have previously in this brief set forth in detail the evidence regarding the weather conditions and will not repeat them here. This evidence seems to us to be conclusive in establishing that the damage to these sheep resulted from a rain storm, a change in weather, and we submit that for such cause appellant is not liable. We have previously set forth on page 20 of this brief the authorities in support of our contention. The carrier is not liable for damage caused by changing weather conditions.

Further, the contracts provide, Sec. 4(a) supra, that the shipper shall load and unload the livestock unless the statutes or tariffs provide otherwise. There is no statute in Montana making it obligatory that appellant perform the loading. Nor has that function been assumed under a tariff. Therefore, appellant was solely responsible for loading these sheep *and he did so at his own risk*. He was an experienced sheep man and it has been found that he "judged" that it was safe to load and transport these sheep (Tr. p. 22). If, as a result of loading the sheep, when wet or damp,

or other unsafe condition, they suffered damage, the carrier cannot be held liable therefor.

Appellee relied on the contracts (Exhibits 1 and 2, Tr. p. 44) apparently, for appellee assumed that the appellant was bound thereby by making the point during the course of the trial that upon the face of the contract it was stated the livestock was received in apparent good order (Tr. pp. 45, 121).

A bill of lading acknowledging the receipt of an article in good order is not conclusive evidence as to condition. (9 Am. Jur., Sec. 422, page 679).

CONCLUSION

Appellant believes that it is not liable for the damage suffered by appellee in this case and that the District Court erred in so finding and concluding and entering Judgment in favor of appellee. This belief of appellant is based on three grounds: First, that there was no negligence proven by appellee against appellant and that appellant proved by a preponderance of the evidence that it was free from negligence; second, that the damage suffered by appellee was due to an inherent weakness and vice of sheep, a condition for which appellant is not liable; and, third, that under the provisions of a valid contract between appellant and appellee, appellant was relieved from liability for damage caused by changing weather conditions, heat or cold, or other conditions over which appellant had no control.

Respectfully submitted,

T. B. WEIR

E. K. MATSON

NEWELL GOUGH, JR.

**In The United States
Court of Appeals
For the Ninth Circuit**

GREAT NORTHERN RAILWAY
COMPANY,

Appellant,

vs.

GEORGE M. MELTON,

Appellee.

Brief of Appellee

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In The United States
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GREAT NORTHERN RAILWAY
COMPANY,

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Appellee.

SUPPLEMENTAL STATEMENT OF THE CASE

The allegations of the complaint that the shipment was not accompanied by appellee, or his agents, and that it was entirely in the custody, control and management of appellant from the time of loading at Kevin until the time of unloading at Wickes are admitted by defendant's answer. R. 11. ,

ARGUMENT

The trial court correctly held that there was no special contract.

We do not think that the case is so complicated or difficult of decision as is foreshadowed in the appellant's brief. The shipment was not one in interstate commerce.

The evidence shows that from Kevin to Wickes the Railroad is entirely inside of the limits of Montana. The Montana statute, Section 8-812, R. C. M., 1947, is correctly copied on page 19 of the brief.

On page 27 thereof appellant quotes a statutory exception:

“The obligations of a common carrier cannot be limited by general notice on his part, but may be limited by special contract.”

Section 8-707, R. C. M., 1947.

There is nothing special about this contract. There was no reduction in the freight charge, and no other consideration for any special contract. The complaint, R. 4, has the following words in paragraph 3:

“* * * for the plaintiff had agreed before the delivery of the said sheep to defendant that he would pay the freight charges on them demanded by the defendant, and usually charged by the defendant.”

In the answer of the defendant, these allegations of paragraph 3 are admitted. R. 11.

The Court will note the word “special” in the foregoing statute. A special contract must always be express. It is something different from an ordinary contract, and it is in the case of the carrier necessary that there be a cheaper rate than the ordinary freight charged other persons for the same service. It would seem to us that there can be no cheaper rates allowed to any customer by any road engaged in interstate commerce under the Acts of Congress in existence for 30 years or more. No interstate commerce carrier would dare plead that it had

given a different rate to any particular shipper, except what the general public paid for the same service. 35 or 40 years ago special contracts could be entered into by carriers, and reductions in freight given. If the Court is interested in the ancient law, which is against this contract's here being a special contract, we cite:

Ward v. Mo. Pac. Ry. Co., 58 S. W. 28-158, Mo. 226;

Indianapolis Coal and Traction Co. v. Dalton, 87 N. E. 552-43 Ind. App. 330;

Jackson v. Creek, 94 N. E. 416; 47 Ind. App. 541.

On page 26 of the brief, counsel calls the two exhibits to the answer "uniform livestock contracts." A form for a uniform livestock contract seems to us to imply that the exhibits are in the same form as contracts which are between shippers generally and customarily over the Great Northern Railway, and there is, according to the brief of counsel, nothing special about this contract.

Likewise, to get inside of the exception to the general statute as to liability of shippers in local commerce, it would be necessary for the defendant to plead in its answer either that there was a special contract, or facts showing that there was a special contract, but on the contrary, the defendant here shows in its answer that "said sheep were consigned to said plaintiff under the Uniform Livestock Contract," R. 12, thus negating any idea of a special contract.

There could not be any special contract here as to price.

“A common carrier must not give preference in time, price, or otherwise to one person over another, * * *.”

Rev. Codes Montana, 8-703, 1947.

The railway counsel seem to claim that it was breaking the law. We deny that our client was a particeps criminis.

There is no suggestion that by paying an increased rate the claimed limitations on carrier's liability would have been discarded. There was, in short, no “option or opportunity” afforded the shipper. If such a bill of lading was available, then it was incumbent upon the appellee to bring it to light.

“A railroad company engaged in the business of common carrier is bound, under the common law, to receive and carry, within the class of goods it is engaged in carrying, such as are tendered for that purpose, and, in the absence of a special contract, to carry them with the full common law liability of a common carrier. And under the law as established by the great weight of authority, when a shipper goes to a carrier with a view of making a shipment, and the carrier has different kinds of contracts, one by which the carrier insures the goods shipped, and the other by which the shipper assumes all risk, it is incumbent upon the carrier to show the contract actually made. The mere fact, however, that the railroad company accepts the goods and agrees to ship them is not a sufficient consideration for the waiver on the part of the shipper of the carrier's liability as insurer. There must be some other consideration such as a reduced rate, because under the common law it is the duty of the railroad company to ship goods tendered, and of a class which it carried; and the mere fact that it accepts goods and agrees to ship them is not a consideration which will

support a contract whereby the carrier is relieved from its common law liability for damages resulting to the goods received. We think this doctrine is based upon reason; and, while the courts of the United States are very much divided upon the question of the liability of a common carrier, under a special contract limiting liability, and are not uniform in their holdings, yet we are inclined to the opinion that where a common carrier seeks to relieve itself from a common-law liability, it is incumbent upon the carrier to show that there was a consideration for the exemption claimed."

McIntosh v. Oregon Railroad & Navigation Company, 17 Idaho 100; 105 Pac. 66.

The appellant argues that the rate charge made was for shipment under conditions and limitations imposed by the contract. In support thereof, it cites the Montana case of *Rose v. Northern Pacific Railway Company*, 35 Mont. 70; 88 Pac. 767. We cannot agree with appellant's interpretation of that case, or that it applies here. Therein the plaintiff received a passenger ticket at a reduced rate in consideration of which the carrier's liability for her baggage was limited to \$100.00. In a suit instituted to recover \$1,775.00, the alleged value of certain baggage, it was held the reduced fare was an adequate consideration to sustain the stipulation as to liability.

Judge Dobie of the 4th Court of Appeals, in his work on *Bailments and Carriers*, page 380, has this to say:

"The contract limiting the carrier's liability must possess the ordinary elements of contractual validity, and, to be effectual, must hence be supported by a consideration. But as common carriers are bound, owing to their public profession, to carry without any contract limiting their liability, their mere agreement

to carry does not furnish any consideration for a contract to limit their liability. In order, therefore, that such contracts must be valid, some other consideration must be found, moving from the carrier to the shipper."

- (b) IF THERE HAD BEEN A SPECIAL CONTRACT, THE CARRIER WOULD STILL BE LIABLE UNDER THE EVIDENCE.

Subject to certain exceptions the common law and statutory liability of a common carrier of livestock is that of an insurer. The recognized exceptions are those losses or injuries resulting from (a) an Act of God; (b) the public enemy; (c) the negligence or wrongful act of the shipper, and (d) the peculiar nature and propensities of the animals. (13 C. J. S., 131 et seq.)

While it is true that this liability can be limited by a special contract, the effect of the special contract is merely to create and define certain cases and conditions under which its full common law liability shall not attach. And when the carrier seeks to escape liability on the ground that the loss of, or injury to, the chattels was due to causes as to which it is exempt under its contract, the burden of proof rests upon the carrier to bring such loss or injury within its contractual exception.

Dobie on Bailments and Carriers, P. 388;

Nelson v. Great Northern Railway Company, 28 Mont. 297; 72 Pac. 642.

If it were conceded that the shipment was made pursuant to the terms of the bill-of-lading, we fail to see how it improves or alters the position of appellant. By Section 1-(a) of its contract, R. 13, the carrier is excused from

liability, unless its negligence is a contributing factor, for "any loss thereof or damage thereto, or delay caused by the Act of God, the public enemy, quarantine, the authority of law, the inherent vice, weakness, or natural propensity of the animal, or the act or default of the shipper or owner, or the agent or either, or by riots, strikes, stoppage of labor or threatened violence." These are the very things, quarantine alone excepted, which the carrier is already protected from by the common law and Montana Statute. Section 1-(b), R. 14, excuses the carrier, unless caused by its negligence, for "overloading, crowding upon one another, escaping from cars, pens, or vessels, kicking or goring, or otherwise injuring themselves or each other, suffocation, fright or fire caused by the shipper or the shipper's agent, heat or cold, changes in the weather or delay caused by stress of weather or damage to or obstruction of track or other causes beyond the carrier's control." Here again, we find, the exceptions are in the nature of the inherent weaknesses or propensities of the animals, the fault of shipper or the Act of God. Section 4-(a), R. 14, charges shipper with the responsibility of loading and unloading. It is obvious that this section does not afford a shield. The loss sustained by appellee was not in the process of loading or unloading.

Stripped of its repetition and surplusage, we therefore find that the carrier's contract in this instance did not confer any other defense than that to which it was already entitled by the common law and statute. If we read the appellant's brief correctly, it is the inherent defect defense upon which it relies.

According to the weight of authority where it is shown that livestock not accompanied by the shipper was de-

livered to the carrier in a good condition and was received at its destination in bad condition the burden is on the carrier to show that the loss or injury was not the result of its negligence.

13 C. J. S. 551;

Dobie on Bailments and Carriers, p. 347.

The sheep were in good condition when loaded. R. 89, 94. It was admitted by the appellant that they were received by it "in apparent good order." R. 45, 121.

The effect of appellant's written admission of "apparent good order" is of importance. Such receipt is *prima facie* evidence of their condition. This is especially true with respect to all circumstances which were open to inspection and visible.

9 Am. Jr., Sec. 422, page 679.

The District Court found from the evidence that the livestock were loaded in good condition. Finding VIII, R. 23.

The sheep were in bad condition when received. They were down, piled on each other, badly tromped and hurt. R. 46. They were down badly in the north ends of every car. R. 49, 102.

Such was the court's finding. Finding V. R. 21.

To overcome this *prima facie* case, and to fix the blame upon the natural propensities of the sheep, the appellant produced its employees who helped load at Kevin and who accompanied the shipment to Wickes. Each bore faithful testimony to a careful, smooth journey, with no rough handling or sudden stops. R. 139, 146, 154, 165.

Each conductor inspected the shipment during his tour of duty, and found everything in good order. R. 140, 145, 150, 151, 159.

“Sheep O. K.” at Powell. R. 147.

“Nothing wrong at Wolf Creek.” R. 150.

Sheep seen in daylight at Helena; nothing wrong R. 151, 158.

Even at Wickes, we are told by appellant’s agents that there was nothing wrong. R. 153. “Nothing out of the ordinary.” R. 159.

If the sheep arrived in the good condition attested by these witnesses, why then did it behoove appellant to explain the cause of appellee’s losses—losses not seriously questioned—by its theory of inherent defect?

To support its hypothesis of inherent defect the appellant produced one witness Dr. Harold L. Nordell, a licensed veterinarian. We believe his testimony so far as material can be fairly summarized as follows: That if sheep were loaded wet or become wet during shipment there would be the hazard of exposure with possible resulting respiratory illness. R. 171. That sheep are easily frightened, they identify their lambs by scent and that if transported 200 miles and if throughout “were roughly handled,” it would have killed a number of them. R. 174, 175. On cross examination he admitted that if the sheep were loaded dry, with intermittent showers throughout, and no piling or rough handling, the loss sustained by appellee could not thus be explained. R. 176, 177.

We are left to speculate as to the animal propensity or defect to which we can assign the loss. The doctor does

not venture an opinion—in passing it is to be noted that his examination was conducted eleven days after the shipment arrived, R. 169—but he does suggest that the damage which manifested itself in the form of “bum lambs” was due to loss of scent. With that we have no argument, but loss of scent hardly explains the death of 58 ewes or 149 lambs.

The explanation for this loss if one is needed is to be found in the following: The train was four hours forty-five minutes late in leaving Great Falls; R. 134; it usually arrived at Wickes between 9 and 10 A. M.; R. 135, on the morning in question it arrived at 10:30 A. M. R. 129. Therefore, we find that on the run between Great Falls and Wickes it made up approximately three hours to three hours thirty minutes of the lost time. This would indicate an unusual, if not excessive, speed. Helena was the last stop before Wickes. Between Helena and Wickes there is a 2.2 grade. R. 79, 154. At Wickes the sheep were piled in the ends of the cars. The speed or jerking on the grade doubtless was the cause of the trouble.

The appellee was waiting to receive his sheep at Wickes. For what then transpired we quote from the testimony, on direct, of the conductor:

“A. When I got there, I met Mr. Melton. I didn’t know who he was at that time; I didn’t know he was Mr. Melton. He was pretty well put out when I told him I couldn’t unload them, just set them out and go. He was pretty mad and wanted me to stop and unload them. If I can remember, he wanted one certain car spotted. He said if he could get that one spotted, it wouldn’t be so bad. That is the way I remember.

Q. Did you explain to Mr. Melton the reason why you could not delay your train?

A. I told him I had a message from the dispatcher to set them out and go.

Q. At that time, Mr. Marceau, was anything said to you, or did you note any condition of the stock in the cars?

A. I didn't notice any piled up or anything. We generally move so much that we wouldn't pay much attention to them. All I did was get the stuff set out and get out of town." R. 152.

And from the cross-examination of the same witness:

Q. He was making some complaint about the condition of the sheep?

A. He was complaining plenty about us not unloading them.

Q. He wanted you to spot the cars, is that correct?

A. That's right.

Q. Which you refused to do?

A. I didn't refuse, I told him my instructions said not to.

Q. You failed to do it?

A. I didn't do it." R. 156.

Thus it appears the appellant was fully advised, at Wickes, that something was seriously wrong. It did not deign to investigate or assist; rather the cars were put on a siding with an even steeper grade and left there for an hour and twenty minutes until an extra was sent from Butte to provide the power for unloading. Having discovered the condition of the animals at Wickes, it was then the duty of appellant to do everything possible to minimize the loss.

Even when the loss is caused by one of the excepted perils against which the common carrier is not an insurer,

he is nevertheless liable, if he fails to use reasonable care either to avoid such peril or to minimize the loss after the goods are actually exposed to the peril. The carrier escapes liability only when the loss or damage is due to an excepted peril without any concurring negligence on his part.

Dobie on Bailments and Carriers, page 324, 341;
 Beard v. Illinois Cent. Ry. Co., 44 N. W. 800, 79
 Iowa, 518.

This rule has been adopted in Montana:

"The company were bound to take notice of the signs of approaching danger, and, if of such a character as reasonably to awaken apprehension at a time when the facilities and means of escape from the danger were within their control, they were bound to use such means for the safety of the property entrusted to their care."

Nelson vs. Great Northern Railway Co., 28 Mont.
 297; 72 Pac. 642.

"It is wrongful to refuse to lay out a car for unloading at request of shipper when cattle are suffering."

Johnson v. Alabama Ry., 69 Miss. 191; 11 So. 104.

"It is gross negligence for a conductor to refuse to supply water to hogs after being requested by owner."

Ill. Central Ry. Co. v. Adams, 42 Ill. 472;

Lindsley v. Chicago, etc. Ry. Co., 36 Minn. 539.

The fact that shipper overcrowded cars does not relieve carrier of duty to prevent death by applying water when animals are overheated.

9 Am. Jur. p. 714.

CONCLUSION

Instead of reviewing this brief, we feel that an appropriate conclusion is written by the Supreme Court of Montana:

“Appellant’s contention is that, having presented testimony tending to exonerate it from negligence, the presumption was overcome in the absence of a further showing by the respondent, and a verdict should have been directed accordingly. This is untenable. When a presumption of this character is confronted with testimony in the opposite direction, the result is a conflict of evidence which the jury must resolve. (Rev. Codes, Sec. 8028, subd. 2; *Freeman v. Chicago, M. & St. P. Ry. Co.*, 52 Mont. 1; 154 Pac. 912; *Emerson v. Butte Electric Ry. Co.*, 46 Mont. 454; 129 Pac. 319.”

Johnson v. Chicago, Milwaukee, etc. Ry. Co., 52 Mont. 73; 155 Pac. 971.

We respectfully submit that the judgment should be affirmed.

LEONARD A. SCHULZ,
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H. L. MAURY,
Butte, Montana;

A. G. SHONE,
Butte, Montana,
Attorneys for Appellee.

No. 12906

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

RINA MARIA VATUONE, as Administratrix of
the Estate of Paul D. Vatuone, Deceased,

Appellee.

Apostles on Appeal

Appeal from the United States District Court,
Northern District of California,
Southern Division.

FILED
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CLERK

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In the District Court of the United States for the
Northern District of California, Southern Di-
vision

No. 25476R

RINA MARIA VATUONE, as Administratrix of
the ESTATE OF PAUL D. VATUONE, De-
ceased,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

**LIBEL FOR DAMAGES FOR WRONGFUL
DEATH BROUGHT UNDER THE PROVI-
SIONS OF THE PUBLIC VESSELS ACT**

The libel of Rina Maria Vatuone, as adminis-
tratrix of the estate of Paul D. Vatuone, deceased,
against the above-named respondent, in a cause of
libel, civil and maritime, for damages for wrongful
death, respectfully shows and alleges as follows:

I.

That on the 12th day of July, 1949, libelant was
duly and regularly appointed administratrix of the
estate of Paul D. Vatuone, deceased, by the Supe-
rior Court of the State of California, in and for
the City and County of San Francisco; that she
thereupon duly qualified as such administratrix of
said estate, and ever since such time has been and
now is the duly appointed, qualified and acting ad-

ministratrix of the estate of Paul D. Vatuone, deceased.

II.

That libelant is a resident of the City and County of San Francisco, State of California.

III.

That respondent, United States of America, is a sovereign nation.

IV.

That this action is brought under the provisions of the Public Vessels Act, 46 U. S. C. A., 741 et seq.

V.

That respondent at all times herein mentioned was the owner and operator of the United States Army Transport "General Altman," which vessel was at all times herein mentioned owned, operated and engaged by respondent as a public vessel as defined in the Public Vessels Act of 1925, 46 USCA, Section 781 et seq., and said vessel was employed by respondent in the operations and business of the United States Army Transport Service.

VI.

That on the 15th day of June, 1949, said vessel was in navigable waters of the United States alongside a dock in Oakland, California; that at said time, Paul D. Vatuone, deceased, was an employee of respondent, employed by it as a maintenance man in the marine repair shop of the United States Army Transport Service at Fort Mason, San Francisco, California, and was directed by respondent

to go on board said vessel and to do certain work thereon; that in the course of his employment, said decedent, along with other workmen of respondent, were engaged in testing the workings of Life boat No. 5 on said vessel; that in the course of said work said decedent and others were manually working a certain winch; that at said time and place the respondent carelessly and negligently put in operation the motor operating said winch so that said winch suddenly and very swiftly revolved around and the handle of said winch struck said decedent with such force and threw him so violently that he was killed.

VII.

That said decedent left surviving him libelant herein, who is his widow of the age of thirty-eight years, and a daughter named Paulette Teresa Vatuone, age seven years; that said parties are the sole heirs at law of said decedent; that each of them were totally dependent upon said decedent for support; that this libel is brought for and on behalf of said heirs of said decedent; that at the time of his death said decedent was of the age of forty-four years and was in good health and was earning approximately \$300.00 a month.

VIII.

That by reason of the premises libelant and her daughter have been damaged in the sum of One Hundred Thousand Dollars (\$100,000.00).

Wherefore, libelant prays that a citation in due form of law may issue against respondent, citing

it to appear and answer all and singular the matters set forth herein, and that libelant have judgment for the sum of One Hundred Thousand Dollars (\$100,000.00) damages against respondent, for her costs of suit herein and for such other and further relief as may be meet and proper in the premises.

RYAN & RYAN,

By /s/ THOS. C. RYAN,

/s/ ROBERT McMAHON,

Proctors for Libelant.

State of California,

City and County of San Francisco—ss.

Thomas C. Ryan, being first duly sworn, deposes and says:

That he is one of the proctors for the libelant in the foregoing action; that he makes this verification in the place of libelant because libelant is at the present time outside the City and County of San Francisco where her attorneys have their office, to wit, in the City of Santa Rosa, County of Sonoma, State of California; that your affiant is familiar with the facts concerning libelant's cause of action; that he has read the foregoing libel and knows the contents thereof; that the same is true of his own knowledge, except as to those matters stated therein on information and belief and as to those matters he believes it to be true.

/s/ THOS. C. RYAN.

Subscribed and sworn to before me this 1st day of August, 1949.

[Seal] /s/ ESTHER C. HUSER,
Notary Public.

In and for the City and County of San Francisco,
State of California.

[Endorsed]: Filed August 1, 1949.

[Title of District Court and Cause.]

ANSWER

Now comes the Respondent, United States of America, and answers the libel on file herein as follows:

I.

Respondent has no information or belief as to the allegations of Article I and demands strict proof thereof.

II.

Respondent has no information or belief as to the allegations of Article II and demands strict proof thereof.

III.

Respondent admits the allegations of Article III.

IV.

As to the allegations of Article IV, respondent leaves matters of jurisdiction to the Court.

V.

Respondent admits the allegations of Article V.

VI.

Answering Article VI of said libel, respondent admits that on the 15th day of June, 1949, Paul D. Vatuone was employed by respondent as a rigger in the Marine Repair Shop, San Francisco Port of Embarkation, Fort Mason, California. Admits that on said day Paul D. Vatuone, pursuant to said employment, was performing services at the direction of respondent on the United States Army Transport General Altman while said vessel was in berth in navigable waters of the United States at Pier No. 4, Oakland Army Base, Oakland, California; admits that on said day, while so employed, Paul D. Vatuone was accidentally struck by a revolving crank handle to a lifeboat winch and sustained injuries therefrom, from which he died.

Respondent denies that it carelessly or negligently, or at all, put in operation the motor operating said winch; denies that said accident and death of Paul D. Vatuone was due to any carelessness or negligence of respondent; denies each and every allegation of Article VI inconsistent with the admissions and denials of this paragraph.

VII.

Answering Article VII of said libel, respondent denies that at the time of his death, Paul D. Vatuone was earning \$300.00 a month, and alleges that his said monthly earnings were approximately \$250.00. Respondent has no information or belief as to the remaining allegations of Article VII and demands strict proof thereof.

VIII.

Respondent denies the allegations of Article VIII.

As and for a First Separate and Distinct Defense to the Libel on File Herein, Respondent Alleges:

I.

That said deceased was, on the 15th day of June, 1949, a Civil Service employee of the respondent, and the remedy of libellant for the death of said Paul D. Vatuone is governed by the provisions of the United States Employees' Compensation Act, 1916, as amended (5 USC 751, et seq.), which statute is exclusive.

As and for a Second Separate and Distinct Defense to the Libel on File Herein, Respondent Alleges:

I.

That the accident resulting in the death of Paul D. Vatuone was not caused by any carelessness or negligence on the part of any of the officers, representatives, agents or employees of the respondent.

As and for a Third Separate and Distinct Defense to the Libel on File Herein, Respondent Alleges:

I.

That Paul D. Vatuone, at the time of said accident and death, was a Civil Service employee of respondent.

•

II.

That subsequent to his death, and prior to the filing of this libel, to wit, on June 28, 1949, the alleged heirs at law of said Paul D. Vatuone, on whose behalf this libel is brought, pursuant to the United States Employees' Compensation Act of 1916, as amended (5 USC 751, et seq.), filed a claim for compensation by reason of said death, with the Bureau of Employees' Compensation of the Federal Security Agency; that on August 3, 1949, an award of compensation was made to said claimants by the Bureau of Employees' Compensation in the amount and for the period fixed by statute.

III.

That by virtue of the aforesaid claim and award of compensation in accordance with said Act, the said alleged heirs at law, in whose behalf the libel is brought, have elected to receive compensation for said death, pursuant to said Act, and libelant is therefore barred from pursuing in their behalf any other remedy there may be on account of said death.

As and for a Fourth Separate and Distinct Defense to the Libel on File Herein, Respondent Alleges:

I.

That at the time and place of said accident, said Paul D. Vatuone was careless and negligent in the manner in which he was performing his services aboard said vessel; that said carelessness and negli-

gence proximately caused and proximately contributed to cause the injuries resulting in the death of said Paul D. Vatuone.

Wherefore, respondent prays that the libel be dismissed, and that respondent have its costs of suit, and such other and further relief as may be meet and proper in the premises.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ C. ELMER COLLETT,
Assistant U. S. Attorney.

/s/ ANTOINETTE E. MORGAN,
Assistant U. S. Attorney,
Proctors for Respondent.

[Endorsed]: Filed January 3, 1950.

[Title of District Court and Cause.]

MEMORANDUM OPINION AND ORDER

Rina Vatuone, administratrix of the estate of Paul D. Vatuone, has brought an action against the United States for the death of her husband, who was injured while engaged as a rigger on board the USAT General D. E. Aultman, a public vessel of the United States owned and operated by the United States. Decedent, Paul Vatuone, was a civilian employee of the United States working for the Department of the Army under the authority of the Secretary of the Army, in accordance with

civil service regulations. He was a rigger in the water division, maintenance and repair branch, Shop Section, Fort Mason, San Francisco, California.

The government contends, first, that libelant's claim is barred because the United States Employees' Compensation Act is exclusive as to all employees of the United States covered by the Act. Respondent contends, second, that the claim is barred under provisions of 46 U.S.C.A. 742 and 789 under which the United States is entitled to all exemptions and limitations of liability accorded to owners, charterers, operators or agents of vessels whereby the provisions of the Longshoremen's and Harbor Workers' Compensation Act are exclusive. The government asserts, third, that libelant has invoked her claim under the Employees' Compensation Act and is therefore barred from pursuing her remedy, if any, under the Public Vessels Act.

With respect to the Government's contention that libelant's claim is limited to an award under the Employees' Compensation Act, this court has recently held that one in libelant's position may elect her remedy if suit was commenced prior to the amendment to the Employees' Compensation Act. (*Gibbs v. United States*, No. 25255; *Wright v. United States*, No. 25301. See also *United States v. Marine*, 155 F. 2d 456.) These decisions also dispose of respondent's contention advanced under 46 U.S.C.A. 742 and 789.

The sequence of events in Mrs. Vatuone's case

demonstrates that she commenced her libel under the Public Vessels Act after she had filed her claim but before an award was made by the government. She returned her check in the amount of \$137.28 to the government when it arrived and at no time did she accept any compensation. These facts place the instance case within the language of *Mandel v. United States*, 74 F. Supp. 754, wherein the court said:

“* * * I feel that only actual acceptance of compensation under this Act extinguishes the remedy sought here.”

Libelant did not accept compensation and is entitled to enforce her rights against the United States under the Public Vessels Act.

Accordingly, and based on the evidence adduced at the trial, the Court awards libelant damages in the amount of \$40,000, together with costs. Libelant to prepare findings consistent with this decree. The government's motion to dismiss the libel is denied.

Dated: December 20, 1950.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed December 20, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial on the 25th day of May, 1950, and on the 6th and 7th days of June, 1950, before the Court without a jury, and Ryan & Ryan by Thomas C. Ryan and Robert McMahon appearing as attorneys for the libelant, and Honorable Frank J. Hennessy, United States Attorney; C. Elmer Collett, and Antoinette E. Morgan, Assistant United States Attorneys, by C. Elmer Collett appearing as attorneys for respondent, and the matter having been submitted on briefs and from the evidence introduced, the Court finds the facts as follows, to wit:

I.

That on the 12th day of July, 1949, libelant was duly and regularly appointed administratrix of the Estate of Paul D. Vatuone, deceased, by the Superior Court of the State of California, in and for the City and County of San Francisco; that she thereupon duly qualified as such administratrix of said estate, and ever since such time has been and now is the duly appointed, qualified and acting administratrix of the Estate of Paul D. Vatuone, deceased.

II.

That libelant is a resident of the City and County of San Francisco, State of California.

III.

That respondent, United States of America, is a sovereign nation.

IV.

That this action is brought under the provisions of the Public Vessels Act, 46 U.S.C.A., 781, et seq.

V.

That respondent at all times herein mentioned was the owner and operator of the United States Army Transport "General D. E. Aultman," which vessel was at all times herein mentioned owned, operated and engaged by respondent as a public vessel as defined in the Public Vessels Act of 1925, 46 U.S.C.A., Section 781, et seq., and said vessel was employed by respondent in the operations and business of the United States Army Transport Service.

VI.

That on the 15th day of June, 1949, said vessel was in navigable waters in the United States, alongside a dock at Oakland, California; that at said time, Paul D. Vatuone was an employee of respondent, employed by it as a rigger in the marine repair shop of the United States Army Transport Service at San Francisco Port of Embarkation, Fort Mason, San Francisco, California, and was directed by respondent to go on board said vessel and to do certain repair work thereon; that in the course of his employment, said Paul D. Vatuone, along with other workmen of respondent, were engaged in replacing a shiv on one of the davits of Lifeboat No. 5 on said

vessel; that in the course of said work said Paul D. Vatuone and another workman were manually winding a cable around the drum of the winch which operated said No. 5 Lifeboat; that at said time and place the respondent carelessly and negligently put in operation the motor operating said winch so that said winch suddenly and very swiftly revolved around and the handle of said winch struck said decedent with such force that he was thrown violently to the deck and was killed.

VII.

That said decedent left surviving him libelant herein, who is his widow of the age of thirty-eight years, and a daughter named Paulette Teresa Vatuone, age seven years; that said parties are the sole heirs at law of said decedent; that each of them was wholly dependent upon said decedent for support; that this libel was brought for and on behalf of said heirs of said decedent; that at the time of his death said decedent was of the age of forty-four years and was in good health and was earning approximately \$250.00 a month.

VIII.

That it is not true, as set forth in the third separate defense of the answer filed on behalf of the respondent, that libelant herein elected to receive compensation for the death of her husband pursuant to the United States Employees' Compensation Act of 1916, as amended (5 USCA 751, et seq.). On the contrary, it is a fact that said libelant elected to

bring this present action under the provisions of the Public Vessels Act (46 USCA 781, et seq.).

IX.

That it is not true, as set forth in the fourth separate and distinct defense to said libel set forth in the answer of respondent herein, that said Paul D. Vatuone was careless and negligent in the manner in which he was performing his services aboard said vessel on the day of said accident.

X.

That by reason of the premises libelant and her daughter, Paulette Teresa Vatuone, a minor, have been damaged in the sum of Forty Thousand Dollars (\$40,000.00).

As a Conclusion of Law from the foregoing facts, the Court finds that libelant is entitled to a decree against respondent in the sum of Forty Thousand Dollars (\$40,000.00) and costs of suit, and it is ordered that a decree be entered accordingly.

Dated: Dec. 29, 1950.

/s/ GEORGE B. HARRIS,

Judge of the United States
District Court.

Receipt of copy acknowledged.

[Endorsed]: Filed December 29, 1950.

In the United States District Court for the Northern
District of California, Southern Division

No. 25476

RINA MARIA VATUONE, as Administratrix of
the ESTATE OF PAUL D. VATUONE, De-
ceased,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

DECREE FOR DAMAGES

This cause came on regularly for trial, before the Court sitting without a jury, on the 25th day of May, 1950 and the 6th and 7th days of June, 1950, Messrs. Ryan & Ryan by Thomas C. Ryan and Robert McMahon appeared as attorneys for the libelant, and Honorable Frank J. Hennessy, United States Attorney, C. Elmer Collett and Antoinette E. Morgan, Assistant United States Attorneys, by C. Elmer Collett, appeared as attorneys for the respondent, and the Court having heard the testimony and having examined the proofs offered by the respective parties, and the Court being fully advised in the premises, and having filed herein its findings of fact and conclusions of law, and having directed that a decree be entered in accordance therewith;

Now, Therefore, by reason of the law and findings aforesaid:

It Is Hereby Ordered, Adjudged and Decreed:

I.

That libelant have a decree against the respondent in the sum of Forty Thousand Dollars (\$40,000.00), with interest thereon at the rate of 4% per annum from the date hereof until paid.

II.

That libelant have a decree against respondent for her costs herein, taxed at \$206.93.

Dated this 29th day of December, 1950.

/s/ GEORGE B. HARRIS,
Judge of the United States
District Court.

[Endorsed]: Filed December 29, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Rina Maria Vatuone, Administratrix of the Estate of Paul D. Vatuone, deceased, and her Proctors, Messrs. Ryan & Ryan, and Robert McMahon:

Notice Is Hereby Given that the United States of America, Respondent herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from each and every part of the final judgment and the decree entered in this cause on December 29, 1950, in favor of Libelant and against Respond-

ent, as more fully set forth in said Respondent's assignments of error filed herewith.

Dated: This 26th day of March, 1951.

/s/ FRANK J. HENNESSY,
United States Attorney,
Proctor for Respondent.

[Endorsed]: Filed March 26, 1951.

[Title of District Court and Cause.]

PETITION FOR APPEAL

To the Honorable Judges of the Above-Entitled Court:

Respondent, United States of America, in the above-entitled cause, by and through Frank J. Hennessy, United States Attorney, being aggrieved by that certain final order, to wit, the judgment and decree filed and entered in the above cause on December 29, 1950, hereby claims an appeal therefrom and from the whole thereof, to the United States Court of Appeals for the Ninth Circuit, and prays that such appeal be allowed forthwith.

Dated: This 26th day of March, 1951.

/s/ FRANK J. HENNESSY,
United States Attorney,
Proctor for Respondent.

[Endorsed]: Filed March 26, 1951.

[Title of District Court and Cause.]

ORDER GRANTING PETITION FOR APPEAL

The above-entitled cause having duly and regularly come on for hearing before the above-entitled court, the undersigned Judge presiding, upon petition for appeal of Respondent United States of America duly presented to this court, together with the said Respondent's assignments of error heretofore filed with the Clerk of this court, and the court having considered the same; and it appearing to the court that notice of appeal was duly and timely filed herein on March 26, 1951; now, therefore,

It Is Hereby Ordered that an appeal to the United States Court of Appeals for the Ninth Circuit from the judgment and decree heretofore entered and filed on the 29th day of December, 1950, in the above-entitled cause, be and the same is hereby allowed.

It is Further Ordered that the Respondent United States of America is not required to file cost and supersedeas bond on appeal, and that stay of execution is hereby entered and granted.

Done in open Court this 26th day of March, 1951.

/s/ GEORGE B. HARRIS,

United States District Judge.

[Endorsed]: Filed March 26, 1951.

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS BY RESPOND-
ENT UNITED STATES OF AMERICA

Respondent, United States of America, hereby assigns error in the proceedings, orders, decisions and judgment of the District Court in the above-entitled action, and in the Findings of Fact, Conclusions of Law, and Judgment and Decree entered and filed on the 29th day of December, 1950, as follows:

1. That the Court erred in finding that libelant herein did not elect to receive compensation for the death of her husband pursuant to the United States Federal Employees' Compensation Act of 1916, as amended. (5 U.S.C. 751, et seq.) (Findings of Fact VIII).

2. That the Court erred in finding that libelant elected to bring this present action under the provisions of the Public Vessels Act. (46 U.S.C.A. 781, et seq.) (Findings of Fact VIII).

3. That the Court erred in finding that respondent was negligent. (Findings of Fact VI).

4. That the Court erred in failing to find that prior to the institution of this suit the heirs at law of Paul D. Vatuone, on whose behalf the libel herein was brought, elected to receive and accept compensation for the death of Paul D. Vatuone pursuant to the United States Employees' Compensation Act of 1916, as amended. (5 U.S.C. 751, et seq.)

5. That the Court erred in making and entering its Conclusions of Law and Order for Judgment that libelant is entitled to a decree against respondent in the sum of \$40,000.00, or in any other sum.

6. That the Court erred in entering a Final Decree on December 29, 1950, in favor of libelant in the sum of \$40,000.00, together with costs, or in any other sum in that,

(a) There was no proof or sufficient proof that respondent was negligent in any respect;

(b) The evidence establishes that prior to the institution of this suit the heirs at law of Paul D. Vatuone, on whose behalf the libel herein was brought, elected to receive and accept compensation for the death of Paul D. Vatuone pursuant to the United States Employees' Compensation Act of 1916, as amended. (5 U.S.C. 751, et seq.);

(c) At the time suit herein was instituted, as well as at all other times, the exclusive right or remedy against respondent available to libelant on behalf of the heirs at law of Paul D. Vatuone, on account of the latter's death, was that provided by the United States Employees' Compensation Act of 1916, as amended. (5 U.S.C. 751, et seq.)

(d) Libelant is not entitled to maintain suit herein against respondent under the Public Vessels Act, 46 U.S.C.A. 781, et seq.) the United States not having consented to suit thereunder to recover damages on account of injury or death to an employee of the United States for

which a remedy is provided by the United States Employees' Compensation Act of 1916, as amended. (5 U.S.C. 751, et seq.);

(e) A decree should have been entered in favor of respondent dismissing the libel and awarding the respondent its costs.

/s/ FRANK J. HENNESSY,
United States Attorney,
Proctor for Respondent.

[Endorsed]: Filed March 26, 1951.

[Title of District Court and Cause.]

CITATION ON APPEAL

The President of the United States to the above-named Libelant, Rina Maria Vatuone, as Administratrix of the Estate of Paul D. Vatuone, deceased.

Greetings:

You are hereby notified that in that certain cause in Admiralty in the United States District Court for the Northern District of California, Southern Division, as entitled above, wherein Rina Maria Vatuone, as Administratrix of the Estate of Paul D. Vatuone, deceased, is libelant, and the United States of America is respondent, an appeal has been allowed by order of this Court to the United States Court of Appeals for the Ninth Circuit, upon the petition of the respondent therefor.

You are hereby cited and admonished to be and appear in the United States Court of Appeals for the Ninth Circuit in San Francisco, in the State of California, within forty (40) days from the date of this citation pursuant to an appeal allowed in the above-entitled cause on the 26th day of March, 1951, to show cause, if any there be, why the final decree as entered in the above-entitled cause, upon such appeal above mentioned, should not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable George B. Harris, Judge of the United States District Court for the Northern District of California, Southern Division, this 26th day of March, 1951.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed March 26, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING

State of California,
City and County of San Francisco—ss.

Helen Vale, being sworn, says that she is a citizen of the United States, over 18 years of age, a resident of the City and County of San Francisco, State of California, and not a party to the within action; that affiant's business address is 422 Post

Office Building, San Francisco, California; that affiant served a copy of Notice of Appeal, Petition for Appeal, Order Granting Petition for Appeal, Citation on Appeal, and Assignment of Errors by Respondent United States of America, the originals of which were filed in the above-entitled cause on March 26, 1951, by placing said copies in an envelope addressed to: Messrs. Ryan & Ryan and Robert McMahon, Attorneys at Law, 800 Phelan Building, San Francisco 2, California, which envelope was then sealed and duly and properly franked for mailing without postage, and thereafter, on March 26, 1951, deposited in the United States mail at San Francisco, California; that there is delivery service by United States mail at the place so addressed, and regular communication by United States mail between the place of mailing and the place so addressed.

/s/ HELEN VALE.

Subscribed and sworn to before me this 27th day of March, 1951.

[Seal] /s/ L. C. JACOBSEN,
Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed March 27, 1951.

[Title of District Court and Cause.]

RESPONDENT'S DESIGNATION OF APOSTLES ON APPEAL AND PRAECIPE THEREFOR

To: Ryan & Ryan and Robert McMahon, 800 Phelan Building, San Francisco 2, California, Proctors for Libelant, and to C. W. Calbreath, Clerk of the United States District Court for the Northern District of California:

Respondent hereby designates and requests that the record on appeal in the above entitled action shall include:

1. The Libel;
2. Answer to the Libel;
3. The Reporter's Transcript of Testimony as taken on the part of the libelant, and all Exhibits introduced by libelant not annexed to the Libel;
4. The Reporter's Transcript of Testimony as taken on the part of the Respondent, and all Exhibits not annexed to its pleading.
5. Memorandum Opinion and Order of the Court, filed herein on December 20, 1950.
6. Findings of Fact and Conclusions of Law entered by the Court herein;
7. Final Decree entered by the Court herein;
8. Notice of Appeal;
9. Petition for and Order Granting Appeal;

10. Assignments of Error;

11. Citation on Appeal;

12. Affidavit of service by mail of Notice of Appeal, Petition for and Order Granting Appeal, Citation on Appeal, and Assignments of Error;

13. Praecipe for Apostles on Appeal.

/s/ FRANK J. HENNESSY,
United States Attorney, Proctor for Respondent
United States of America.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 18, 1951.

REPORTER'S TRANSCRIPT

Thursday, May 25, 1950

Appearances:

For Libelant:

THOMAS C. RYAN, Esq.

For Respondent:

C. ELMER COLLETT, Esq.

Mr. Collett: Ready, your Honor.

Mr. Ryan: Ready.

The Court: Will you state the issues, gentlemen, please?

Mr. Ryan: Yes, your Honor. May it please your Honor, on June 15, 1949, Paul Vatuone was employed as a rigger by the United States Government at Fort Mason here in San Francisco. He

was injured on board a United States Army transport that was along side a dock at the Army Base in Oakland, California. He, along with other riggers and mechanics and workmen from Fort Mason were ordered by the Government to go on board this transport, the General Altman, in order to repair part of the lines and the block and tackles on lifeboat number 5. It seems that there was shiv on that lifeboat that had to be replaced.

The Court: What is a shiv?

Mr. Ryan: You know where lines go through a pulley effect?

The Court: Yes.

Mr. Ryan: And it had to be replaced. At the time of the accident here was what was happening. There was a lifeboat drill taking place there for all the lifeboats on that deck except No. 5 that the men were working on, and at the time that a lifeboat drill is taking place ship's electrician is required to stand by an electrical panel so that in case of emergency he can pull the electricity and prevent any accidents.

The Court: A switch? [2*]

Mr. Ryan: Pull a switch, yes. On the day of the accident what was happening was this: First of all, lifeboat No. 5 was up in the cradle, in the davits and it was blocked up there by wood and other means so it couldn't roll. And these men had a cable on the deck and had the cable wound around through another shiv down to the drum of the winch. What they were trying to do at the time of the acci-

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

dent, they were winding by hand this cable onto the drum of the winch. Under ordinary circumstances, usually that can be wound by hand until they come to about one-third of the cable. To use their expression, until the cable sets itself. Then they ask for power to wind it the rest of the two-thirds by power.

In order to do this they had a crank shaped something like this (demonstrating at blackboard), a steel crank shaped like that which fit into a groove at the side of the winch. The top of it was about thirty inches wide, and usually two men would be side by side. It is very hard work. They would be winding it in that fashion, and the gear ratio was such you had to make maybe ten or fifteen turns of that crank to make one revolution of the drum. It is very hard work to do that by hand.

Well, when the work had gone on to a point where they had about one-third of it on the drum, Bill or one of the others—the testimony is a little confusing as to who went to the electrician and asked him if he would furnish power so that they [3] could wind the rest of the two-thirds of the cable by electric power.

When the lifeboat is being raised, gets up to the crib pulley, as they call it, they have what they call a limit switch there that automatically stops everything so that the boat doesn't go clear through there. He apparently tried that and said, "No, that won't work." Then they have another switch near that winch called the dead man's switch, where you keep your hand on that switch all the time to

keep it going and if you take your hand off it stops so that it isn't working. So he said, "No, I can't give you any power because the lifeboat is already up in its nest and we can't have power." The men then said to him, "Oh, all right. Is it all right to keep on winding the rest of the way by hand?" He said, "Oh, sure, sure, go ahead and do that."

So here is how this accident happened. Vatuone was on the inside and another man on the outside, and they were laboriously going like that (indicating) when all of a sudden the motor started and this coil spun around like that, and Vatuone apparently was caught and lifted about nineteen feet in the air, and we have evidence he made a dive and landed on deck on his head. He never did regain consciousness and died the same day.

Here is our theory as to how this accident happened. Immediately they had an investigation. The equipment was [4] installed by the White House Electric Company. The White House men or engineers came down shortly and tested the electrical equipment from source to finish, and the electric power that operated the No. 5 winch was found in perfect working order. The White House people will testify there was only one way in the world for that motor to start, and that was for a person to put on the switch running No. 5 motor on that panel. We took a deposition of such electrician——

The Court: What about the dead man switch? Do you have to keep compression on there?

Mr. Ryan: Yes. That wouldn't work at all unless you had power on.

The Court: That is another avenue of approach.

Mr. Ryan: It could not be turned on at the panel where they had all the switches.

The Court: All right.

Mr. Ryan: We will show you this. We took the deposition of the electrician, of course. According to the theory of the White House man he was the man at fault. He said this. First, we had a statement from him shortly after the accident. We employed Mr. Dan Powers to make an investigation for us.

The Court: What is the visibility situation between the post of the electrician and the operation you have described?

Mr. Ryan: They were thirty feet away on the same deck to one side of the men working on it. [5]

The Court: Any equipment, any paraphernalia that might have obstructed the view?

Mr. Ryan: Nothing. The deposition of the electrician will show. He admits he could see the men. A statement was taken from him first in which he said he stands right at the panel during the whole time of lifeboat drills. He said he may have turned it on and then he says in his statement he turned it off. But no matter what happened, almost immediately after he did something he saw a man lying on the deck.

The Court: What is your estimate of the time in which the motor may have been in operation? What is your estimate of the time?

Mr. Ryan: Oh, it was only in operation for maybe ten or fifteen seconds

The Court: What stopped the operation?

Mr. Ryan: The electrician claims he stopped it by pulling the switch for the No. 5 motor, which he says was on, although he denies he put it on in his deposition. He admits he was there all the time, but denies——

The Court: He admitted he stopped it?

Mr. Ryan: He admitted he stopped it, yes, sir. The man Paul D. Vatuone was 44 years of age at the time of his death. He left his wife who was 37 at the time of his death, and a little girl, Pauline Vatuone, who was 7 years of age at the time of his death. He had worked out at Fort Mason for the [6] Government since 1940, a period of almost nine years; not continuously, however, but at the time of the accident in 1949 he was working for the Government and earning from the Government during 1949 some \$256 or \$60 a month. That is his average. Then to augment that income, during the last two months of his life, May and June, 1949, he worked at a liquor store on Chesnut Street at night. Between the two incomes he was earning a little more than \$300 a month. Later on, your Honor, we will argue and I will present the question of present value of future earnings and life expectancy, and so forth.

This action is brought under the provisions of the Public Vessels Act, this transport being a public vessel of the United States, which was incorporated in the Suits in Admiralty Act. Your Honor has had several of these cases. I know you had Hanz against the United States.

The Court: I have had several cases.

Mr. Ryan: And Simmons and Rubens against the United States. Incidentally this right of action has been taken away from employees of the United States by the act of October 14, 1949. However, that very act provides that it would not affect suits that were already in existence. I think counsel has all the books. I am prepared for that and might as well give your Honor it.

The Court: Have the legal issues been disposed of on [7] motion?

Mr. Ryan: No.

The Court: Pre-trial motion or anything of the kind?

Mr. Ryan: No, never anything like that. We have this problem, for instance: That claim he made allows you to accept compensation rather than to bring a suit for damages. I better tell your Honor the facts in that regard generally.

It seems that immediately after the man was hurt his wife was notified that he was out at Marine Hospital and he died that very day. At the Marine Hospital they told her she should get in touch with a Mr. Sutherland at Fort Mason, and she got in touch with him by phone and he said, "Come on down to the office and I will take care of everything in regard to compensation," so she went down there and he explained it to her this way: "You are entitled to compensation against the Government and also entitled to bring a suit for damages. However," he said, "if you bring a suit for damages, whatever

compensation is paid you must be deducted from the amount you receive."

Well, she wanted to bring suit for damages, and she believed that, she had an application for compensation. Now, about three days later she saw Mr. McMann, the attorney who was proctor for the libellant, and he advised her she had to make a determination. She said she wanted to proceed by way of suit for damages. Immediately, on July 23rd, 1949, [8] before compensation order was made, Mr. McMann sent a telegram to the Employee's Compensation Department in Washington and he said, "Please stop immediately."

The Court: Pardon me one moment. I notice on page 3 an allegation in the answer that, "An award of compensation was made to said claimants by the Bureau of Employee's Compensation in the amount and for the period fixed by statute." You might address yourself to that.

Mr. Ryan: That is what I am doing, coming to that point. That is August 3rd. It was on July 23rd Mr. McMann said, "Please cancel *Mr. Vatuone's* application for compensation because she elects to proceed by way of damage suit rather than accepting compensation." Furthermore, we filed this suit on August 1st, 1949, before that compensation order was made. Furthermore, at the very date that the suit was filed (and I think the file will show this) we served a copy of the proclamation of administrator on the United States Attorney here in San Francisco, and on the same day we sent by registered mail to the Attorney General in Washington a

copy of the complaint in that action. Then after we took all these processes the board in Washington made its order of compensation on August 3rd and sent two checks out which *Mr. Vatuone* did not accept.

The Court: What is the procedure in making those awards? Is it a very formal matter? [9]

Mr. Collett: I have the entire record here, if your Honor please.

The Court: Thank you.

Mr. Ryan: Formal application was made, and afterwards——

The Court: Your theory is that notice of the termination was given prior to the making and entry of an order?

Mr. Ryan: That is so. And furthermore, that she never accepted—I think that is an important part of the matter—she never accepted compensation because two checks were sent out and she didn't cash either of them. She sent them back to Washington with a letter which I prepared and she signed underneath it she had already made her determination to proceed by way of suit for damages and therefore was returning the check, asked them please not to send any more and they never did.

The Court: Well, it is a legal issue, not fact.

Mr. Ryan: Yes.

Mr. Collett: Mr. Ryan, may we admit the amount of that check at this time—those checks that were received and sent back?

Mr. Ryan: Yes. I believe one was \$198 and some cents and \$78, I think. That is one legal issue. The

other legal issue was the right to sue the United States of an employee, and the third is whether the amendment of 1949 took away her right. [10]

Mr. Collett: I will state the issue of the defense hereafter, your Honor.

Mr. Ryan: I have prepared a brief on the law on those three issues, for your Honor's assistance. Here is a copy for you, Mr. Collett.

Mr. Collett: Are you finished?

Mr. Ryan: Yes.

Mr. Collett: If the Court please, this is an action by an Employee of the United States where it is admitted he was employed shore side. He is not a seaman. This is a case of a repairman who goes on board a ship the only difference from all those cases in which it was held if the individual is not a seaman it doesn't come within the meaning of the Sieracki case in that he is an employee of the United States It is important to keep that in mind. This man is an employee of the United States.

Now, there are, I would say, three issues to which we direct our attention legally. First, the problem that the United States in the compensation act has provided an exclusive remedy as to any such case as this regardless of any other enactment. Second, notwithstanding the compensation act, that do to the fact that the longshore harbor workers compensation act provides exclusive action, and in Section 740, Title 46, provides that the United States is not liable to any greater extent than is any private concern, that the [11] exclusive remedy as to this individual is right in the compensation act.

The Court: Under the longshoremen's act may well be a reduction to the amount of any recovery in another forum. I went through that a very involved case, the name of which escapes me presently, but I went through the matter elaborately in that Perello case. You are more familiar currently with these matters than I am.

Mr. Collett: The Court hasn't gotten my point. There is no question under the Perello act that the stevedore has a right to sue a third person. But we have a situation here in which the United States is the employer of this individual.

The Court: What is Brady Steamship case?

Mr. Collett: It was a case in which the question of the agent was involved, the question as to whether or not the agent's negligence itself was the injury, then he might be sued for that, but if it was merely for the performance of duty that the agent cannot be sued. But here we have a situation in which the longshoreman's and harbor workers act expressly provides that as to his employer—and the Sieracki case repeats it and recognizes it—all cases recognize that as to his employer the longshoremen's harbor workers compensation act is the exclusive remedy. The United States is the employer of this man. Now, the longshoremen's harbor workers compensation act in so many words states that [12] the compensation is not applicable to an employee or officer of the United States. I call your Honor's attention to that forthwith.

The Court: Why were these matters reserved

until trial time? Could they not be disposed of by preliminaries?

Mr. Collett: The matter of this compensation, if your Honor please, is one I have had before Judge Goodman for some time because it is involved in the Banks case, Buckner case, this case, and——

The Court: You see, I have been out in another world, another stratosphere so long, I want to bring myself up to date about these.

Mr. Collett: The only evidence of general concern with which your Honor has not had some familiarity in these cases, we did finally have the matter as to the compensation problem presented to Judge Goodman, and it was presented two weeks ago last Monday in the Banks case, and all the documents necessary with regard to compensation were presented to the Judge and the Judge dismissed the complaint. In that particular case the compensation had been received and been accepted.

The Court: In that case there had been acceptance of the award and consummation of the transaction, is that right?

Mr. Collett: That is right. The money had been received. These cases have all fitted into the problem. At some point some Court is going to hold on the compensation question itself [13] where the line is to be drawn.

The Court: Then I approach this as a problem of some novelty to these Courts.

Mr. Collett: That is right.

The Court: I always seem to have these cases of first impression.

Mr. Collett: In developing this case we followed along after the Banks case, but the switch to Judge Erskine, he simply put them at the bottom and it wasn't possible to raise matters of law. Also it depended on receiving necessary documents from Washington.

The Court: I appreciate your comment because it is difficult for me to understand why you approach a trial of this extent without having first some kind of matters tried in advance, but I understand.

Mr. Collett: If I might again make myself——

The Court: I understand the issues.

Mr. Collett: You have the issues first, of course, the references to a Fifth Circuit case, Posey vs. TVA in which the compensation was held to be exclusive. U. S. vs. Lawrence, Fourth Circuit. This Court and this district, the case. Your Honor, I should say the Lawson case, Smith case, all involving seamen.

The Court: Well, we will have that at some appropriate step, Mr. Collett. All those cases are reviewed. [14] I certainly wouldn't assume now, at the threshold, to undertake a determination of the basic legal question. I will reserve my ruling. If you make your motion now to dismiss the complaint on the ground that the administrator herein of the estate of the deceased elected under the law as announced and that that election was exclusive, under the circumstances, I will reserve my ruling until the conclusion of the testimony.

Mr. Collett: Well, the matter in the Banks case,

counsel was trying to reach this particular and Judge Goodman, if he had continued with the calendar would have set the issues separately. I think it is relatively a simple matter on the second point in that the United States has not consented to be sued in this action because the compensation act is exclusive by reason of the act.

The Court: Well, on that longshoreman's act, I can't at this juncture—bear in mind it has been months and months since I reviewed these authorities—I can't at this juncture adopt the same parity of recollection. I read the longshoreman's act in connection with a case presented by Mr. Resner, a jury trial. At that time I read the longshoreman's act, and in that case I tried the question arose with respect to acceptance of compensation under the longshoreman's act. The defendant explained the respondent had accepted the payments under the longshoreman's act, several payments.

Mr. Collett: Yes, they were set off. No question about [15] that situation. The law is clear a longshoreman has a right to sue a third person. There is no question about that. You can go down the line of all the cases, as against a third person, no question about that. But the act expressly provides—I am reading 905 of Title 33—(reading). No question. In the Sieracki case the Supreme Court recognizes that. But we have a situation here in which the United States is the employer of this particular individual and is also the owner and operator of this particular ship.

Mr. Ryan: May I interrupt. In line with your

Honor's suggestion, I have several witnesses who are very short, and if we could reserve decision on this matter I would like to argue it much more fully.

The Court: I am trying to assimilate the law at one fell swoop and sometimes it is difficult. Appreciation should be had, Mr. Collett, you are pretty filled with your subject. And I am happy and gratified to see you so filled with your subject because there were many months when we didn't have anyone at all filled with any kind of subject in Admiralty in this Court and particularly concerned about conditions; but I am happy to see the avidity with which you approach the subject. However, I say to you, Mr. Collett, if you intend to present a motion to dismiss and ask a ruling at this juncture, I would like to reserve judgment until, using the language of my distinguished colleague, the Honorable Judge [16] Goodman, "Until the broad vistas of the litigation are finally before." We will take a short recess.

(Thereupon a short recess was taken.)

(Further legal arguments reported but not transcribed.)

Mr. Collett: I move to dismiss the action on the ground that the remedy of this particular individual, the libelant, in accordance with the provisions of Title 46—746, Title 33, longshoreman's and harbor workers act, as well as the provisions of Title 5 of the Employee's Compensation Act, that the remedy

herein was exclusive and that the maintenance of this action is barred.

The Court: Well, at best your motion concerns itself with law and fact under the theory that the election was consummated, so under the circumstances it would require the Court to take testimony. Secondly, the Court perceives that many other pieces of litigation are affected by this ruling, and under the circumstances the Court will reserve ruling on the motion to dismiss until the conclusion of the testimony and taking of the testimony.

Mr. Collett: The Court has in mind that a portion of that motion is devoted to three phases of it, that is, the compensation act is exclusive in itself——

The Court: Yes, as a matter of law.

Mr. Collett: Yes. And two reasons, because of itself and because of Section 746 wherein the United States has not [17] consented and not waived sovereign immunity to be sued, and on that point courts have all been very uniform in that the presumption is against suability. That the act must be strictly construed and not extended in liability.

The Court: I recognize your argument, counsel, and the Court will reserve ruling until the conclusion of the taking of the testimony.

Mr. Ryan: Shall I proceed?

The Court: It is now twelve o'clock. You might have the witness sworn, if you wish, and go through the preliminaries so we will be able to go right ahead.

JOHN HARRIS

the witness called on behalf of the Plaintiff being first duly sworn testified as follows:

Direct Examination

By Mr. Ryan:

Q. What is your name, please?

A. John Harris.

The Court: Your occupation, Mr. Harris?

A. Machinist, sir.

The Court: All right, we have now reached the twelve o'clock noon hour.

Mr. Ryan: Your Honor, may I have an order of the Court ordering these witnesses to return at 2:00 o'clock?

The Court: All witnesses who have been summoned to appear in this case are now excused until 2:00 o'clock. You are to [18] return at 2:00 o'clock without further order or notice. 2:00 o'clock this afternoon.

The Court: Recess until 2:00 o'clock.

(Thereupon the Court was adjourned to the hour of 2:00 o'clock p.m.) [19]

Thursday, May 25, 1950, 2:00 P.M.

JOHN HARRIS

resumed stand being previously duly sworn testified further as follows:

The Clerk: The witness on the stand is John Harris, heretofore sworn.

(Testimony of John Harris.)

Direct Examination

(Continued)

By Mr. Ryan:

Q. Mr. Harris, I believe you stated before lunch time you were a machinist, is that correct?

A. That is right.

Q. By whom are you employed?

A. By the Government at Fort Mason.

Q. How long have you been employed by them?

A. Nine years.

Q. Do you recall the accident that occurred to Mr. Vatuone on June 15, 1949?

A. I do, sir.

Q. What vessel did that occur on?

A. The Aultman.

Q. Is that United States Army Transport General D. E. Aultman? A. That is right, sir.

Q. Were you the foreman in charge of work that was going on there at that time?

A. I was.

Q. What type of work were you doing at the time of the accident?

A. We were changing a shiv that was sticking.

Q. First of all, you were changing a shiv on what?

A. On a lifeboat davit.

Q. And that was a lifeboat on the General Aultman, is that correct? A. Yes.

Q. Where was the General Aultman at the time?

A. She was at pier 4, Oakland Army Base.

(Testimony of John Harris.)

Q. Alongside of a dock? A. Yes, sir.

Q. What lifeboat were you working on?

A. No. 5.

Q. On what side of the ship is that?

A. Starboard.

Q. Was the starboard side alongside of the dock or away from the dock?

A. It was away from the dock.

Q. Where was No. 5 lifeboat situated as to being fore or aft on the vessel?

A. Well, it is pretty near midship. A little bit aft.

Q. How many lifeboats are on the starboard side of the Aultman?

A. Oh, about eight boats. There is two in a nest.

Q. When had you started this particular work?

A. Oh, around nine o'clock in the morning.

Q. I mean, the day before had you worked on it? [20]

A. The day before the accident, we started the job the day before the accident.

Q. Where do you men report to work?

A. Fort Mason.

Q. Were you all employees of the United States Army Transport Service? A. Yes, sir.

Q. Since that they have changed the name of it, haven't they? A. That is right.

Q. What do they call it now?

A. The MSTS. That is a branch of the Navy. The Navy took over all Army transportation.

Q. MSTS? What is that?

(Testimony of John Harris.)

A. Military Sea Transportation Service.

Q. When did that become effective, that change?

A. 1st of April, 1950.

Q. The day before this accident did the members of your crew, if we could call them that, start out from Fort Mason?

A. That is right, yes, sir.

Q. And how many men did you have in your crew or gang?

A. Well, I originally went over there with nine men.

Q. What classifications did they have? Were they machinists?

A. The were all qualified machinists.

Q. The day before then, was Vatuone one of the men that went over with you?

A. Yes, he started the job the day before. [21]

Q. So we understand the nature of the work that was going on, I have here a Treasury Department of the United States, United States Coast Guard Service manual for lifeboat and able seaman, and I show you a picture of a davit on page 20 and on page 21 a drawing of a lifeboat cradle and davit and I will ask you if that generally represents the situation that you were working on?

A. Yes, that represents it.

Mr. Ryan: I will show that to counsel. Oh, counsel has some pictures. That is better still. First of all, in view of the facts that the pictures just show part of the area I wish to show counsel, your Honor, this picture of the davit and the lifeboat

(Testimony of John Harris.)

and the cradle, just for illustration purposes purely. It may be of some help to your Honor.

The Court: It may be received for that purpose.

Mr. Ryan: Pages 20 and 21. I guess the book could go in evidence, couldn't it, your Honor?

The Court: Certainly.

The Clerk: Pages 20 and 21 of the book?

The Court: For the purpose of illustration.

(Pages 20 and 21 of the manual were marked Libelant's Exhibit 1 for identification.)

Q. (By Mr. Ryan): Now, that drawing shows a lifeboat cradle in its nest, doesn't it?

A. Yes, sir. Of course, they have two lifeboats nestled there. [22] There is one nestled inside of the lower boat.

Q. I see. Here is a picture counsel handed me taken September 15, 1949, showing a boat with No. 5 on the bottom of it. Does that look like the situation that existed on the Aultman? A. Yes, sir.

Mr. Ryan: I will introduce that in evidence and show it to your Honor.

Mr. Collett: No objection to the picture.

The Court: So ordered.

(The picture was marked Libelant's Exhibit 2 in evidence.)

Q. (By Mr. Ryan): As I understood your testimony—what was out of order? The shiv?

A. Yes, sir, a double shiv.

(Testimony of John Harris.)

Q. As I understand it, a shiv is like a pulley where a cable goes through, is that correct?

A. That is right. It is a guide for cables.

Q. So that you were going to replace that shiv with another shiv? A. Yes, sir, a new shiv.

Q. When you did that how did you keep lifeboat No. 5 in its place in the cradle after you had removed the cable?

A. Well, we have riggers. They go up there and use cable to strap the boats in the cradles so they won't drop down, and then they have a bar that keeps the boats on the cradle from rolling down the track. [23]

Q. Did you complete that work the day before this accident? A. Yes, sir.

Q. Did you have any more work to do the day of the accident, June 15, on that lifeboat No. 5 or its davits?

A. Yes, we had to re-run the cable.

Q. Would that be to run the cable to get it in a position where the winches would work the lifeboat up and down as you wanted it? A. Yes.

Mr. Collett: If the Court please——

Mr. Ryan: It is preliminary, your Honor.

Mr. Collett: I know, but he has spent a great deal of time about matters that I thought had some materiality. They don't. He has taken unnecessary time. And I want him to let the witness testify, ask questions and not testify himself.

Mr. Ryan: I will do that. We haven't got to the vital point as yet.

(Testimony of John Harris.)

Mr. Collett: Get to the point.

Q. (By Mr. Ryan): On the day of the accident, June 15, did Mr. Vatuone go over with you again from Fort Mason to this boat? A. He did.

Q. At the time or immediately before the accident what type of work was Mr. Vatuone doing?

A. He was assisting in putting the cable back on the drums. [24]

Q. Where was the cable?

A. It was lying on the deck.

Q. From the deck where did it go?

A. It went up through the shivs and on to the drum and then it was wrapped on the drum by hand.

Q. When you refer to the drum, you mean the drum of the No. 5 winch? A. That is right.

Q. Is that the winch that operates the No. 5 lifeboat? A. That is right.

Q. Now, how was Vatuone to wind the cable around the drum winch?

A. Well, he was standing, we will say, in the center of the crank facing aft, cranking it by hand.

Q. I show you a picture which counsel has shown me taken September 15, 1949, showing a man handling a crank. Is that the type of crank he was operating? A. Yes, sir.

Mr. Ryan: We offer this as our next exhibit, your Honor.

Mr. Collett: No objection.

The Court: It may be marked.

(Testimony of John Harris.)

(Picture was marked Libelant's Exhibit No. 3 in evidence.)

Mr. Ryan: I would like the Court to see that.

Q. (By Mr. Ryan): Now, at the time of the accident do you [25] know how much of the cable had been wound around the drum of No. 5 winch?

A. Oh, I would say about one-third.

Q. How many men were engaged in that work of operating that crank?

A. There was two men at the time. There was four riggers there. They were taking relays at it.

Q. Who were the four men that were working on the crank? A. They were riggers.

Q. Was Vatuone one of them?

A. Yes, he was one of them.

Q. Now, let me ask you this: While Vatuone and his fellow workers were operating that crank by hand was there any other activity taking place on that same deck in regard to the other lifeboat?

A. Yes, there was a lifeboat drill in process.

Q. When you say a lifeboat drill was in process, were all the other lifeboats you have mentioned save this one, No. 5, that was being repaired, in use?

A. They were lowering them overside, and then brought them back up and put them back in their nest.

Q. While Mr. Vatuone and his fellow workers were winding this crank was the motor on the No. 5 winch in operation or not in operation?

A. It wasn't in operation so far as the power was concerned. [26]

(Testimony of John Harris.)

Q. That is what I want to find out, yes. Do you know anything about this proposition: Is that fast or slow work, winding that cable on the drum?

A. According to the gear ratio, it is very slow.

Q. Why is that?

A. I imagine it is because of the weight.

Mr. Collett: I object to his imagination, if the Court please. A. Well, the weight.

Q. (By Mr. Ryan): Can you turn that easily or is it hard work to turn it?

A. Oh, it is labor to turn it, hard work.

Q. Do you know anything about this, about the ratio or how many turns at the crank in order to get one revolution of the drum?

A. Fifteen to twenty.

Q. How long had Mr. Vatuone and his fellow workers been winding that cable the morning of the accident before the accident happened?

A. An hour and a half.

Q. I see. All right. In that hour and a half they had succeeded in winding one-third of the cable?

A. Well they weren't winding the whole hour and a half. They had been winding, actually, they wound about, I would say, forty-five minutes. [27]

Q. When you say they had wound about one-third of the cable, how long was the cable that they had to wind?

A. I wouldn't know what the length of the cable was.

Q. Well, I don't mean accurately, but give us an approximation if you can.

(Testimony of John Harris.)

A. It would be 100 feet.

Q. How big was the cable, by the way?

A. Five-eighths.

Q. Five-eighths inch cable? Now please tell his Honor what you know about this accident? Tell him where you were and what you were doing.

A. I was standing aft of the winch facing towards the port of the ship. I was directing two men to take some shivs down below. Then I heard this commotion or whirl of the motor as it started up, and I heard some men hollering, and when I turned I seen—the moment I turned around I found Mr. Vatuone in the—he seemed to be in the air, then his head hit the deck.

Q. Was his head the first portion of his body to hit the deck? A. Yes, sir.

Q. What type of deck was it?

A. It was a steel deck.

Q. Let me ask you this: Immediately before you saw Mr. Vatuone go through the air and light on the reck, what had he [28] been doing so far as you observed?

A. Cranking. Cranking the cable on the winch.

Q. Was there only one man? Was there only Vatuone or more than one cranking the crank?

A. Mr. Dwyer was standing on the end of the crank helping Mr. Vatuone.

Q. Who was on the outside and who was on the inside of that handle?

A. Mr. Vatuone was on the inside.

Q. And Dwyer on the outside?

(Testimony of John Harris.)

A. Yes, sir.

Q. When you saw him going through the air and land, how far was he from where he had been cranking the cable? A. Fifteen feet.

Q. When you say you heard the motor, did you actually hear the hum of the motor?

A. Well, I think I did, yes.

Q. Did you observe what was happening to the cable when the motor started?

A. It was whipping through the shivs.

Q. When you say it was whipping through the shivs, was it going rapidly or slowly?

A. Oh, it was going very rapidly.

Q. What happened to this big metal crank handle? A. It was twisted. [29]

Q. Was it thrown out of its position as indicated in the picture? A. Yes.

Q. Where did that land?

A. On the deck not far from Mr. Vatuone.

Q. When you say that was twisted, what—you say it was twisted out of its normal condition?

A. That is right.

Q. What is that handle made of? Metal?

A. Steel.

Q. Do you know how the motor stopped?

A. I have no idea how the motor stopped.

Q. How long after Vatuone landed on the deck was it before the motor stopped?

A. A few seconds.

Mr. Ryan: I see. That is all, your Honor.

(Testimony of John Harris.)

Mr. Collett: In the light of what you told me at recess there is no contention that Vatuone was seaman, I understand? You are not making any contentions that Vatuone was a seaman?

Mr. Ryan: He wasn't a member of the crew, if that is what you mean, of that vessel. He was an employee, as I have stated before, of the United States Government and went on board vessels, Government transports, and did repair work.

The Court: Well, whatever legal definition may be given to him, you are not foreclosing yourself from such argument? [30]

Mr. Ryan: No, absolutely not, your Honor, no.

Cross-Examination

By Mr. Collett:

Q. How long had you know Mr. Vatuone, Mr. Harris?

A. Oh, I have known him off and on for four or five years.

Q. And you worked together at Fort Mason?

A. On a few jobs, yes, sir.

Q. What was his classification on the 15th of June? A. He said he was a rigger helper.

Q. A rigger helper? Did he have any other classification prior to that time?

A. He did, yes. He was a rigger prior to that.

Q. When?

A. Well, that was before he was laid off. They had a lay-off at Fort Mason, laid off a couple of hundred men and then we hired some of the fellows.

(Testimony of John Harris.)

and the only way they could come back there again was to come there as helpers.

Q. Do you know when he was laid off?

A. I am not sure of that, sir.

Q. Or how long he was laid off?

A. No, I am not sure of that.

Q. Do you know in what capacity he came back to work?

A. He came back as a helper.

Q. What kind of helper?

A. Rigger helper. [31]

Q. Are you sure of that?

A. So far as I know, sir, yes, sir.

Q. You had your back turned to Vatuone, whatever he was doing?

A. Not quite my back.

Q. Prior to the accident?

A. I had my side turned.

Q. Were you looking at Vatuone at the time?

A. I seen him go on the crank, yes.

Q. Well, you saw him go on the crank?

A. I saw him approach the crank and go to work on the crank, then I turned my head the other direction.

Q. How long was it from the last time you saw him until you heard the whir, as you stated?

A. Oh, maybe a minute or so.

Mr. Collett: No further questions.

Mr. Ryan: That is all, Mr. Harris.

The Court: The witness is excused. Thank you.

(The witness excused.)

HOWARD PATRICK DWYER

called as a witness on behalf of the Plaintiff being first duly sworn testified as follows:

The Clerk: Will you state your full name to the Court, please?

A. Howard Patrick Dwyer. [32]

Direct Examination

By Mr. Ryan:

Q. Mr. Dwyer, by whom are you employed?

A. Marine Repair Shops here at Fort Mason.

Q. In what capacity are you employed?

A. Rigger.

Q. Were you cranking this handle we were talking about with Mr. Vatuone at the time this accident happened?

A. Yes, I was.

Q. Please tell his Honor how it happened.

A. Well, we come on the ship the day before and we took the wire all off the drums and we stretched it out so we can get the wire free from the shivs, and was going to take and take the wire in front of us to get the shivs free. We got the wire out and removed the shivs and we started to crank on there, the only way to do that, because the boat is cradled up against its nest and it was impossible any other way. So we had to crank. We kept cranking the crank, got so much and rest in between time. One of the other riggers, he started cranking, and it is pretty tough so we told him to take a break and two of us kept on going. We relieved each other quite a few times, you know.

(Testimony of Howard Patrick Dwyer.)

during the morning there for about, oh, pretty close to an hour, I guess, and we had pretty close to one-third of it on the drum, and then this other rigger went over and started cranking a little bit and it was getting a little harder, so Paul said to me, "Let's get her done," so I said, "O.K." Then him inside and I was outside, we cranked there for awhile, and all of a sudden [33] it just, the handle started going and it threw me a little bit to the side and kind of mussed me up a little bit, and then when I got my breath I see Paul laying on the deck and I see everybody coming around screaming around there.

Q. When you say the handle started turning, do you mean it started turning without the effort of you and Vatuone pushing it?

A. That is right.

Q. Did you hear a hum of the motor when it started to turn?

A. Well, I never heard nothing because it merely glanced me, threw me to the side.

Q. Did it throw you off your feet?

A. Yes, it did.

Q. Did you land on the deck? A. Yes.

Q. When you were on the deck did you notice what was happening to the cables that were on the deck?

A. No, I didn't notice anything for, oh, a few seconds, and then Paul was laying down on the deck then, see, and then I got my bearings. I went to get some help quick to get Paul fixed up.

(Testimony of Howard Patrick Dwyer.)

Q. Did you observe one way or the other what was happening to the cables?

A. No, I didn't notice.

Q. Do you know how long that motor was on or how it was [34] stopped?

A. No, I don't know how it was on and how it was stopped.

Q. You centered your attention on Vatuone, then? A. That is right.

Q. Let me ask you this: Had you and Vatuone performed this particular work on many times in the past?

A. Well, we have worked together quite a bit, yes.

Q. Doing this same kind of work?

A. That is right.

Q. Normally if this operation had been performed according to usual custom, do you usually put the cable back of the drum part way by hand?

A. Yes, to get it seated, and that is the way you usually start off, they seat your wire in there, like on the drum there are, on the winch, like little sections.

Q. You mean little grooves?

A. Little grooves where the wire lies and keeps hanging, and gets so many of them seated then we usually take and throw the wire over the side, and that way we can haul it up with the winch after we get the juice on.

Q. After you get one-third of it up by hand——

(Testimony of Howard Patrick Dwyer.)

A. We ask for power so we can get the rest of it on.

Q. In all the time you have worked there, have any of you men ever turned the power on yourselves.

Mr. Collett: I object to that as calling for a conclusion [35] of the witness.

The Court: Sustained.

Mr. Ryan: In the past, you were talking about the normal operation, you get one-third of the cable wound by hand and then you have the power applied. Has it been the custom or practice for the electrician to do that?

Mr. Collett: I object, if the Court please, to the custom and practice.

Mr. Ryan: All right.

Q. Did you know that the power was suddenly going to come on the motor?

A. Well, the power, so far as I knew, was dead.

Q. So it was unexpected when this thing happened.

A. That is right.

Mr. Ryan: That is all.

A. Because there was a life boat drill going on in progress there, and that is the first time I ever worked around a life boat drill going on.

The Court: Where was the life boat drill?

Mr. Ryan: I think this is the way to answer that question:

Q. All life boats with the exception of this one were being part of the life boat drill, weren't they?

A. That is right.

(Testimony of Howard Patrick Dwyer.)

Q. In other words, all other lifeboats—— [36]

Mr. Collett: Are you testifying now, or is the witness?

The Court: That is all right. It is explanatory. Was the synchronization on the winch interdependent on the lifeboat drill?

Mr. Ryan: I am going to have a man testify about that. We also have the deposition of the electrician who was on the job at the time it happened.

The Court: All right.

Mr. Collett: No questions.

Mr. Ryan: That is all.

The Court: You are excused.

(Witness excused.)

Mr. Ryan: Your Honor, in sequence—I am not going to read it, but we filed the deposition of Edward S. Bielski which was taken May 19, 1950, and he was the other of the riggers that was on this said job, which at this time I offer you in evidence, and we can read pertinent parts hereafter.

The Court: You can read it hereafter or it may be considered read.

(Deposition was marked Libellant's Exhibit 4 in Evidence.)

LIBELLANT'S EXHIBIT No. 4

In the Southern Division of the United States
District Court for the Northern District of
California

RINA MARIA VATUONE, as Administratrix of
the Estate of PAUL D. VATUONE, Deceased,
Libellant,

vs.

UNITED STATES OF AMERICA,
Respondent.

DEPOSITION OF EDWARD S. BIELSKI

Friday, May 19, 1950

Be It Remembered: That on Friday, May 19, 1950, commencing at the hour of 4:30 o'clock p.m. thereof, pursuant to oral stipulation between the proctors for the respective parties, at the offices of Messrs. Ryan and Ryan, in the Phelan Building, 760 Market Street, in the City and County of San Francisco, State of California, personally appeared before me, Anna T. Carroll, a notary public in and for the City and County of San Francisco, State of California, authorized to administer oaths, etc.,

EDWARD S. BIELSKI

witness called on behalf of the libellant in the above-entitled action.

Messrs. Ryan & Ryan, represented by Thomas C. Ryan Esq., appeared as proctors for libellant in the above-entitled action.

Mr. Frank J. Hennessey, U. S. Attorney, repre-

Libellant's Exhibit No. 4—(Continued)

(Deposition of Edward S. Bielski.)

sented by Charles E. Collett, Esq., Assistant U. S. Attorney, appeared as proctors for the respondent.

And the said witness, having been by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

It is hereby stipulated and agreed by and between the proctors for the respective parties that the deposition of the above-named witness may be taken on behalf of the libellant at the offices of Messrs. Ryan & Ryan, in the Phelan Building, 760 Market Street, in the City and County of San Francisco, State of California, on Friday, May 19, 1950, before Anna T. Carroll, a notary public in and for the City and County of San Francisco, State of California, and in stenotypy by Eldon N. Rich, a competent official reporter, and a disinterested person.

It is further stipulated and agreed by and between the proctors for the respective parties that the deposition, when transcribed into longhand typewriting, may be read in evidence by either party on trial of said cause; that all objections as to the notice of time and place of taking the same are waived; that all objections as to the form of the questions are waived unless objected to at the time of taking said deposition; that all objections as to materiality, relevancy and competency of the testimony are reserved to all parties for the time of trial.

Libellant's Exhibit No. 4—(Continued)
(Deposition of Edward S. Bielski.)

It is further stipulated and agreed by and between the proctors for the respective parties that the reading over of the testimony to or by the said witness and the signing thereof are hereby expressly waived.

It is further stipulated and agreed by and between the proctors for the respective parties that the notary public need not remain during the taking of the deposition.

EDWARD S. BIELSKI

a witness called in behalf of the libellant in the above-titled action, being duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination

By Mr. Ryan:

Q. What is your name, please?

A. Edward Bielski. Do you want the middle initial?

Q. Yes. A. S.

Q. And how do you spell Bielski?

A. B-i-e-l-s-k-i.

Q. Where do you live, Mr. Bielski?

A. 1475 Tenth Avenue, San Francisco.

Q. And by whom are you employed?

A. Military Sea Transport Service. It was the army, I was employed by the army before. Now we are transferred over, so how would you put that?

Q. Well, all right. You were formerly——

Libellant's Exhibit No. 4—(Continued)
(Deposition of Edward S. Bielski.)

Mr. Collett: The Navy took over all the transports.

Q. (By Mr. Ryan): That was March 1st, 1950?

A. That's right.

Q. And before that you were with the Army Transport Service?

A. That's right.

Q. Operating out of Fort Mason, San Francisco, California?

A. I think they had the supervisor of water division and marine repair, port of embarkation.

Q. I see. Now how long have you been working between the military transport service and the Army transport service?

A. From December of '45 to the present.

Q. I understand you were in the Navy, is that right?

A. Correct.

Q. All right. Now were you present when this accident happened to Paul Vatuone?

A. Yes.

Q. And what was your occupation with the service on that day?

A. I was a rigger.

Q. Rigger, all right. And you worked out of where?

A. Fort Mason, San Francisco.

Q. All right. Now on that day were you with——

A. Oakland Army Base and Fort Mason all belong to one, but we reported to Fort Mason for work and go wherever our ship was. It is not necessarily going to Oakland. We might go to Richmond or Alameda or some other place.

Q. On June 15, 1949, when this accident hap-

Libellant's Exhibit No. 4—(Continued)
(Deposition of Edward S. Bielski.)

pened, were you on the Army transport General D. E. Altmann? A. Yes.

Q. And where was the General Aultmann at that time?

A. She was tied up at the Oakland Army Base, and I forget what pier now.

Mr. Collett: Pier 4.

The Witness: Pier 4.

Q. (By Mr. Ryan): All right. Now, who were the riggers who were working with yourself and Vautone when the accident happened?

A. Paul Vatuone—I always say Vatuone.

Q. All right?

A. And Howard Dwyer, and the other two men were working in different parts of the ship.

Q. All right. What work were you doing just before the accident happened?

A. We were reeving the boat falls back on the winch, on the boat davit winch, or however——

Q. That was the winch of No. 5 lifeboat, wasn't it? A. Well——

Mr. Collett: Ask him the question and let him testify.

Q. (By Mr. Ryan): Where were you working?

A. On boat No. 5, winding the boat falls back on to the drum.

Q. Now, how were you winding the boat falls back on the drum?

A. By hand, or manual power.

Libellant's Exhibit No. 4—(Continued)
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Q. And when you say "on the drum," you mean the drum of what winch? A. No. 5.

Q. All right. Do you remember what side of the ship that was on?

A. No. 5 was on the starboard side.

Q. And where was it with relation to being forward or aft or amidships?

A. Let's see. That would be amidships.

Q. I see. And on what deck was it?

A. On the boat deck.

Q. All right. Now where was No. 5 lifeboat when you were winding the falls back on the drum of the winch?

A. It was cradled in its davit.

Q. At that time, when you were doing this work, can you state whether or not there was a boat drill in progress?

A. Yes, there was a boat drill in progress.

Q. All right. Now so the Court will understand this——

Mr. Collett: I am going to object to the form of the question as to what the Court is going to understand or what it will not understand.

Mr. Ryan: What was the last question?

(Record read.)

Mr. Ryan: Oh.

Mr. Collett: There is no assumption as to what the Court is or is not going to understand.

Q. (By Mr. Ryan): How long, approximately,

Libellant's Exhibit No. 4—(Continued)
(Deposition of Edward S. Bielski.)

were these falls that you were winding on the drum,
Mr. Bielski? A. I don't recall.

Q. Who was winding in on first? Which one of
the riggers?

Mr. Collett: Well, I object to that question as
being ambiguous.

A. I couldn't recall who started first. I might
have started first, maybe Dwyer or Paul did.

Q. All right. Now when you——

A. Because when you are working in a group,
you don't pay any attention.

Mr. Collett: Well, if you understand what he
means. I don't know exactly what he means by the
first.

Q. (By Mr. Ryan): How long did this wind-
ing, how long had it been going on manually when
this accident happened?

A. Oh, 45 minutes or an hour.

Q. And how much of the falls had already been
wound around the drum when the accident hap-
pened? A. About one-third.

Q. Now by what means did you turn the drum
on the winch? A. With a crank.

Q. And can you describe that crank to us?

A. Well, it was just like a regular car crank,
only it is much bigger.

Q. Did that crank fit into the drum?

A. Yes, sir.

Q. And how far does the arm that protrudes
out from the drum extend, approximately?

Libellant's Exhibit No. 4—(Continued)
(Deposition of Edward S. Bielski.)

A. 10 or 12 inches.

Q. All right. Does that extend at right angles out from the drum? A. Yes.

Q. Then is there another arm of the crank that extends in a perpendicular direction from the end of the right angle one? A. Yes.

Q. And how high is the perpendicular part of the crank? A. About 10 or 12 inches.

Q. Then is there a third part that protrudes at a right angle out from the perpendicular part?

A. Yes.

Q. And how long is that second right angle crank?

Mr. Collett: You have got this all balled up. You have got it extended out perpendicular from the drum.

Mr. Ryan: It is like this (indicating).

Mr. Collett: I know how it is, but it doesn't extend out from the drum perpendicularly. There is a portion inside the drum, then it turns, then it drops down.

Mr. Ryan: Look, there is this right angle part, there is the perpendicular part, and there is the second part.

Q. Will you answer that? How far does it extend, the right angle part, out from the perpendicular part?

A. You mean the one going straight up and down?

Q. Yes, the one you can put your hands on.

Libellant's Exhibit No. 4—(Continued)
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Mr. Collett: You are not talking about the same thing. He says the one that goes straight up and down and you say the one you put your hands on. Now what are you talking about?

Q. (By Mr. Ryan): Now you put your hands on the part of the crank that is farthest removed from the drum, don't you? A. That's right.

Q. Now how long is that part, that arm that is farthest removed from the drum?

A. I would say between 20 and 28 inches.

Q. O.K. And do you turn that, do you move that with an up and down motion? A. Yes.

Q. All right. When you were cranking it, were you cranking it by yourself or did you have someone helping you?

A. I was cranking by myself.

Q. All right. How many times do you have to turn that crank handle before you will have the cable go around the drum once?

A. If I remember, it is seven or eight turns of the crank to make one full turn.

Q. All right. A. Around the drum.

Q. Now will you please tell us what happened at a period when you stopped cranking and someone else relieved you?

A. Well, I was cranking for about, oh—I don't recall how long. I wasn't looking at my watch. When Paul and Dwyer said, "We will take over now." So I stepped out and they took over.

Q. I see. And when they took over, which one

Libellant's Exhibit No. 4—(Continued)

(Deposition of Edward S. Bielski.)

was on the inside nearest the drum and which one was on the outside at the end of the crank?

A. Mr. Vatuone was inside and Mr. Dwyer was outside.

Q. I see. Now, how quickly after they relieved you did the accident occur?

A. I had my back turned when the thing happened.

Q. Yes. How far had you moved away from the crank when the accident happened?

A. Oh, about 15 or 20 paces, feet—15 or 20.

Q. And did you walk away immediately after they relieved you at the crank handle?

A. I was walking away slowly.

Q. And tell us what you know about the accident, when it happened. What did you see happen, as far as Paul Vatuone is concerned?

Mr. Collett: Well, now, I object to the form of that question as being about five questions in one.

Q. (By Mr. Ryan): Tell us what happened. Go ahead. Tell us what happened after you left the crank handle.

A. Well, I walked about 15 or 20 feet aft when Paul landed a little bit behind me or at my feet.

Q. All right?

A. So I turned around and kneeled down alongside the man that was injured, to see how bad he was injured, and hollered for somebody to get a doctor or ambulance. And I stayed right there

Libellant's Exhibit No. 4—(Continued)
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looking at Mr. Vatuone, and I really didn't see what went on around, or what happened, or anything else. Then when the ambulance arrived, I helped carry him off the ship and went over to the port dispensary or hospital, whatever it is, on the army base there.

Q. All right. That is all right. Now let me ask you this: You said you had been working on board the Altmann about, oh, 45 minutes or an hour, I believe you said, when the accident happened; is that right? A. That's right.

Q. All right. Now, during that time, did anyone ask the ship's electrician to turn on the power so you could put the cable on the winch by electricity rather than doing it manually?

Mr. Collett: Well, I am going to object to that question on the ground that it is a—"anyone" is a very ambiguous statement. It could be anyone on the ship or in the state of California, maybe; I don't know.

Mr. Ryan: All right.

Q. You may answer that now, subject to his objection.

A. Well, after we had one-third of the wire wound back on the drum, Paul suggested that if we had power, we could wind that up with power.

Q. And by "Paul," do you mean Mr. Vatuone?

A. Mr. Vatuone. And so, I don't recall who located the ship's electrician, but Paul went up and came back with the ship's electrician.

Libellant's Exhibit No. 4—(Continued)
(Deposition of Edward S. Bielski.)

Q. All right.

A. And asked him if we could have power. The electrician came up and said we could not have, the power was on but it wouldn't work because the boat was two-blocked against the limit switches, and he wouldn't give us any power, or he said something—I don't recall now. It is over a year ago. So he said we couldn't have any power to wind it, and if we did have power, it wouldn't work anyway. So we asked him if it was all right to go ahead and wind it up, and we said we could wind it by hand and so we commenced winding it by hand. So I started winding.

Q. Did he say it was all right?

A. He said it was all right.

Q. I see.

A. The way—when I first went to work at the army, Paul was my foreman and I always looked up to him. And after a while he was terminated, you know, or laid off, and he was brought back. But then I always did look up to Paul as a leader and foreman, because I worked in his gang there for quite a while.

Q. I see. Let me ask you this: You know, after the accident happened, did you ever see the motor turning on that No. 5 winch?

A. Well, I didn't see the motor running, but it started up again, because the wire moved on deck. I could see the wire moved where I was kneeling alongside Paul there.

Libellant's Exhibit No. 4—(Continued)
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Q. You mean, the wire moving with nobody cranking it? A. Nobody cranked it.

Mr. Ryan: I believe that's all.

Cross-Examination

By Mr. Collett:

Q. Who was the foreman on the 15th day of June, 1949?

A. Our regular foreman was Mr. Emil Hahnemann, but it happened that day, the gang went over without a foreman, see—stayed over on this side.

Q. Hahnemann wasn't there?

A. No, he stayed over at Ft. Mason.

Q. How many were you in the gang at Ft. Mason? A. About five.

Q. Five? What time did you leave Ft. Mason?

A. Oh, I don't remember if we left by bus that day. Let's see. Around between 8:15 and 8:30, I think. No, about 8:15 we left there—8:15, around that neighborhood.

Q. What time did you arrive over at the Altmann?

A. Well, we arrived a quarter to or nine o'clock, around nine o'clock.

Q. Nine o'clock. And at the time that you arrived, what did you do?

A. Well, we reported to boat No. 5 and began our work.

Q. Began your work?

A. See, because day before we had pulled all

Libellant's Exhibit No. 4—(Continued)

(Deposition of Edward S. Bielski.)

that wire off that drum, so the machinist could get the shivs out and rebush them and rework them.

Q. I see. You had worked on the ship the day before?

A. I didn't work on it the day before. The day before I was on the General Walker working, and I got, I done the same work on the General Walker, and a fellow by the name of——

Q. What was the condition when you reported on board the Altmann at about nine o'clock, as observed by you, as to the work to be done?

A. Well, all the wire was off the drum and it was to be wound back on.

Q. To be wound back on? A. Yes.

Q. And that was to be the collective job of the five of you, was to wind that wire back on to that drum? A. That's correct.

Q. And you started to do that at nine o'clock, did you? A. Yes, sir.

Q. When did the boat drill start?

A. I think they hold their boat drills at ten.

Q. You don't recall?

A. No, I don't recall, but they have a regular time that they hold them.

Q. Yes. Well, do you recall, have you any recollection, as to the interval of time that had elapsed in the amount of work that was done before the boat drill was begun? A. No, I don't.

Q. You haven't?

Libellant's Exhibit No. 4—(Continued)
(Deposition of Edward S. Bielski.)

A. Because I wasn't interested in no boat drill or anything about it.

Q. Yes. Now the five of you undertook to start rolling the wire back on to the drum?

A. Well, no, the three of us. It was five men reported there for work. You asked me how many men.

Q. Yes?

A. Yes. Two men went down to work in another part of the ship. They had a motor to move down in the laundry. That is where Mr. Jackson and Mr. Jordan was working. That was the other two men.

Q. I see. Then there was you and Vatuone and who else? A. And Dwyer.

Q. And Dwyer?

A. Jackson and Jordan made up the gang.

Q. I see. And they were off on another job?

A. Down below.

Q. And when you started to work, rolling the wire on to the drum, who started first?

A. That I don't recall. I could have started first or Paul or Dwyer. I don't remember that.

Q. Well, did you have——

A. Because I worked, in the time there before the accident, I was winding there together with Paul and then winding with Dwyer. You see, in about five or six minutes you get winded, and another fellow takes over.

Q. Is it stiff winding?

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(Deposition of Edward S. Bielski.)

A. Yes, it is very stiff winding. It takes all the beef you have to turn that thing.

Q. Did you work it by team, two men each time, and two on, one off?

A. We worked two together and then one off, and then just before the accident I was winding myself.

Q. You were winding by yourself. How long had you been winding by yourself?

A. Oh, I don't recall—five or six minutes.

Q. Five or six minutes?

A. Maybe longer.

Q. How long is your recollection from nine o'clock that you reported on, to the time of that accident's occurrence?

A. How do you mean?

Q. Well, what is your recollection of the time interval? How long had you been working rolling the wire on to the drum, the three of you, before the accident happened?

A. Well, I figured it was about 10:20 when the accident happened.

Q. Figured about 10:20. All right. And then the three of you had been consistently, steadily——

A. Working.

Q. Changing off shifts, working the crank, rolling that wire back on to the drum?

A. That's right. See, when the wire was all off, we had to start rigging it all, reeving it by hand through all the different falls, then bring it down to the drum, secure it, bolt it to the drum, to secure

Libellant's Exhibit No. 4—(Continued)

(Deposition of Edward S. Bielski.)

it to the drum. We wasn't winding steadily from nine o'clock. The wire was all off the drum. So we had to run it through all the leads.

Q. Well, then, let's go back and see just what you did, then.

A. Then we had it brought to the drum, and then we laid it all out on deck to see that it wasn't crossed over or fouled up.

Q. Well, when you got there at nine o'clock, what is the first thing you did?

A. Started reeving our wire through the shivs, bringing it to the drum, laying it out, seeing that it ain't crossed up or anything.

Q. Now I wonder if you might give me an illustration as to just what you did there at the beginning, just where the wire was, if you can?

Mr. Ryan: Here is a pencil.

A. I would say this is the deck of the ship (drawing diagram), and that this was the wire was laid out, back and forth like that, see (indicating)?

Q. Where is the winch?

A. I will say, for instance, the winch is sitting right there (drawing).

Q. Where is the lifeboat?

A. Well, let's see. Yes, she's offside and down, and your boat is right in here. Two blocks in the davit, and then you have shivs up on the top where she comes over, like this (indicating). You have shivs there, a hook that holds the boat, you know. Then we had to run all this wire from the deck

Libellant's Exhibit No. 4—(Continued)

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up through the shivs, and there is another deck up above there, and run the wire down this way and then around these shivs, so as to lead down to this winch. You understand me? So your davits would be like this (indicating), and your winch was set up and your boats and two blocks here. This wire was laid all over deck. So we run it up. Let's see, it was two wires. You start up from the top with your boat hook, run it all through and bring it down through the shivs.

Q. Where were the switches located for it?

A. Well, you have a rail.

Q. For the control—let me finish the question.

For the control motor to the winch?

A. The only switch that is for that boat there is on the rail, as we call it.

Q. A rail switch?

A. And we call it a dead man switch.

Q. Dead man switch?

A. That is for raising the boat. You see, the boat goes down by gravity.

Q. Yes. What is the limit switch?

A. The limit switch is up on the davits, and when the boat hits the limit switch, it is supposed to cut off the power.

Q. Where is the limit switch with reference to these shivs, do you call them? A. Shivs.

Q. To the shivs?

A. And that is the wheels or pulleys that the wire goes through. This is the davit, for instance,

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and there is a switch in a track-like. It rolls similar like a wheel with an iron, and there is a roller comes, this davit is like this (indicating) and then it sets in a track affair, like, you know. As she rolls up this track, she hits this wheel, she goes over this wheel and knocks it down, and that cuts off the juice, and when that is up against it we call it two-blocked.

Q. Yes. Now you are running the wire through the shivs, and that had nothing to do with the limit switch?

A. Oh, no, that had nothing to do with the work.

Q. I see. Then you arrive at nine o'clock, and you say your first work was to clear that wire and run it up through the shivs?

A. That's right, to see that it wasn't tangled, you know, and would go free.

Q. Yes. Now about what time, if you recall, did you begin to crank?

A. I would say around 9:45, maybe, or 9:50.

Q. About 9:45, 9:50, and your recollection is that the accident occurred at 10:20, is that right?

A. That's correct, yes.

Q. Do you recall who started to crank first?

A. No, I couldn't say. I might have started first, or two men starting together.

Q. When two men were on the crank, they faced each other?

A. Or side by side.

Q. Side by side?

Libellant's Exhibit No. 4—(Continued)

(Deposition of Edward S. Bielski.)

A. (Nodding in affirmative.)

Q. All right. And immediately preceding you, when you took over the crank, were Vatuone and Dwyer together on it?

A. That's right, they were in there together.

Q. And you relieved Dwyer and Vatuone?

A. That's right.

Q. And how long, do you recall, that you were cranking? A. Five or six minutes, I guess.

Q. Five or six minutes? A. Yes.

Q. Now, what is your recollection as to just what happened when you were relieved? Just try to put yourself back at the time and tell us just what your recollection is.

A. Well, Mr. Vatuone and Mr. Dwyer relieved me, I started to walk aft.

Q. You started walking aft?

A. M-hm (affirmative).

Q. Did you observe in what direction they had assumed with regard to the crank?

A. No, I didn't.

Q. You didn't? A. No.

Q. You just turned your back and started walking aft? A. (Nodding in affirmative.)

Q. And what is your next recollection?

A. Well, Mr. Vatuone landed at my feet there.

Q. Ahead of you or behind you, or did you hear the thud?

A. Well, let's see. Right alongside of me. I would say.

Libellant's Exhibit No. 4—(Continued)
(Deposition of Edward S. Bielski.)

Q. So he had been projected in the air, or did he roll on the deck? A. I couldn't say.

Q. You couldn't say?

A. No, I didn't see it.

Q. You just became aware of the fact that he was behind you, or to the side of you, and that attracted your attention? A. Yes.

Q. Now, when you left the crank, you didn't go over to the rail or do anything with the rail switch?

A. No.

Q. The dead man switch. You didn't touch that, did you?

A. I would have to go past the two men.

Q. You would have to go past the two men? Your recollection is, you simply turned your back and turned away, going aft?

A. That's right.

Q. Now this conversation that you said you had with the electrician, when did that occur?

A. Well, that was after we had about one-third of the wire wound on, we went——

Q. Now you say when you had one-third of the wire done? A. Wound on.

Q. Now can we place that with reference to your relieving Vatuone and Dwyer? That is, prior to the time that they relieved you, how long was it immediately prior to that time, the time you took over the crank? Understand my question?

A. No, I don't.

Q. Well, you relieved, so you testified, Vatuone

Libellant's Exhibit No. 4—(Continued)

(Deposition of Edward S. Bielski.)

and Dwyer, and then you were relieved by Dwyer and Vatuone? A. That's right.

Q. And you had walked away?

A. That's right.

Q. And Vatuone landed somewhat in the vicinity of your feet? A. (Nodding in affirmative.)

Q. Now, you stated that you were five or six minutes cranking by yourself, right?

A. That's right.

Q. And in your last hitch there. Now, how long was it, what was the interval of time between this so-called conversation with the electrician and your hitch on the crank?

A. Oh, I would say about ten minutes.

Q. About ten minutes?

A. M-hm (in affirmative).

Q. And what is your recollection with regard to who was present at that conversation?

A. Me, Mr. Vatuone and Mr. Dwyer and the electrician.

Q. Do you know who the electrician was?

A. I don't know his name. I am not good at remembering names.

Q. Looking aft from that particular lifeboat and that winch and drum, there is a control, there is a passageway that leads into a control room, isn't there? A. That's correct.

Q. It is about what distance?

A. Oh, I never knew where that control room was until that day of the accident.

Libellant's Exhibit No. 4—(Continued)
(Deposition of Edward S. Bielski.)

Q. You didn't know where it was?

A. Let's see. I have heard them say 20 feet.

Q. 20 feet. Were you ever in that control room?

A. Never.

Q. I think you testified that Vatuone left the vicinity of the winch where you were working to find the electrician, is that right?

A. That's correct.

Q. And he came back with him?

A. Came back with him.

Q. In which direction did they come?

A. They came from back aft; evidently he must have met him right on the boat deck there.

Q. Do you recall how long he was gone?

A. Oh, he wasn't gone very long.

Q. I see. A. Only a few minutes.

Q. Did you have any conversation prior to the time of his leaving? A. Not that I recall.

Q. Then——

A. What do you mean, conversation?

Q. Well, conversation with Vatuone.

A. Well, about the work or——

Q. Well, Vatuone just picked up and walked off, was that it?

A. Oh, no, he said, "We'll get the ship's electrician and see if we can get power." See, you have to wind a certain amount of turns on the drum so she seats itself, and once the wire is seated in its grooves, you can wind it by power. That is the way we had been doing it.

Libellant's Exhibit No. 4—(Continued)

(Deposition of Edward S. Bielski.)

Q. Oh, was that remark made at the beginning of it? A. No, it wasn't.

Q. Had you been cranking for some time when that remark was made, or that suggestion was made?

A. Yes, we were cranking for some time, and Mr. Vatuone says, "We will see if we can get some power and wind it by power."

Q. Then the electrician came back with Vatuone, and what was the conversation there?

A. Well, he told us that we couldn't have no power because the boat was two-blocked against the limit switches, and it wouldn't work. So we said we would wind it by hand, and he said it was all right to go ahead and wind it.

Q. How do you know he was the electrician?

A. He said he was.

Q. Did he have on any uniform? A. No.

Q. Any insignia?

A. Not that I recall of. He might have. I didn't look too closely.

Q. You don't know; did he say in your presence that he was the electrician?

A. Well, after I was in the captain's office, they brought the ship's electrician in, to give a statement. Same man.

Q. Now in this conversation, he stated that you couldn't turn on the power, or that he couldn't turn it on so that you could operate the winch?

A. That's right.

Libellant's Exhibit No. 4—(Continued)
(Deposition of Edward S. Bielski.)

Q. And had you ever crank-wound the wire on any other ship?

A. Just got through on the General Walker before that.

Q. Winding by the crank?

A. Winding by the crank.

Q. Vatuone on that job?

A. No, he wasn't. He was on another. You see, Vatuone was working with Dwyer on the Altmann. I was working on the Walker, so when my job was done on the Walker, I was to go over there and help the boys out. The gang was split up. It so happened we had quite a few ships in.

Q. Prior to this other job that you mentioned, had you ever done any winding by hand crank?

A. Practically at that time—that was the way we were doing it, overhauling all the ships. Most of the transports, yes.

Q. And did you use the hand crank to wind the wire on to the spool or the winch—the drum, rather?

A. Yes, sir.

Q. In each instance?

A. Each instance we would wind out one-third and get power and wind the rest of it on.

Q. You would wind on one-third?

A. One-third, about that much.

Q. Why would you have to wind on a third?

A. On this drum it has grooves in it, and the wire has to seat itself into the grooves. Once it is seated, then she lines up, is lined up, you have to

Libellant's Exhibit No. 4—(Continued)

(Deposition of Edward S. Bielski.)

line it up, and you wind so much by hand and then you can wind with power. The power will take over.

Q. And on the other jobs you had—the other ships—you had succeeded in using the power after you had wound the wire on the drum about one-third the length of the wire, is that right?

A. That's right.

Q. And you worked with Vatuone on any of those jobs? A. Yes.

Q. Which one?

A. I can't recall the ship. Let's see. I would have to know which ship it was before that.

Q. And was it the same kind of gear, the winch and the drum and the dead man switch and the limit switch, in regard to the davits?

A. Yes, same thing.

Q. And do you know how the power was turned on on the other ships?

A. By the ship's electrician. We would always ask him.

Q. You would ask him?

A. You see, we have no business turning on any power or touching any switches, whether you are a rigger, machinist, or who you are.

Q. Yes. You asked the electrician, and in the other instances the power was turned on?

A. That's right.

Q. Did you or the other men with you operate

Libellant's Exhibit No. 4—(Continued)
(Deposition of Edward S. Bielski.)

any switch then to stop and turn on the power as you used it?

A. Usually the ship's electrician is there, and he handles that end of it.

Q. Well——

A. The ship's electrician is there, and he works the switch.

Q. Well, on the other ships with the power on, you just didn't keep continuously winding it; it was undoubtedly stopped to clear the wire and run it through the shivs?

A. Oh, yes. No, the wire is already run through the shivs, and the butt end is secured to the drum, and we watch that she is seating herself.

Q. And you have to stop it and start it?

A. And guide the wire as it goes on, that's right.

Q. And you would have to start it and stop it and start it?

A. Yes.

Q. Now, how did you do that?

A. Ship's electrician would be on the switch.

Q. On which switch?

A. Dead man's switch.

Q. On the dead man's switch?

A. Or one of the workers. See, I can go on to that ship Monday morning and say, they'll say, pick up a load for me. I will go try the gear, and if it is o.k., I will find the mate or the ship's electrician and ask him if he would have the power on on No. 1, No. 2 gear, or whatever. He would say o.k. and

Libellant's Exhibit No. 4—(Continued)

(Deposition of Edward S. Bielski.)

he puts the power on. If there is anything wrong, he says, "That gear is out." He knows about it.

Q. Do you know what Vatuone's classified position was at the time, on the 15th of June?

A. No, I don't. You see, we go by grades and steps, and I don't know. He was first class, I know.

Q. You are doing work that might be called a rigger, but you don't know whether that was actually his classification?

A. That's right. See, Paul was terminated a couple of times. By that, I mean laid off and called back. You could get it from personnel files.

Q. Well, if you don't know, just say you don't know. You don't know of your own knowledge, is that it?

A. No, I would have to guess. It would be guessing.

Q. Did you work steadily during the same period of, say, the year prior to June 15, 1949, at Ft. Mason? A. Yes.

Q. You worked steadily?

A. I worked steadily.

Q. And——

A. From December, '45, to the present.

Q. I see. How long, do you recall, had Vatuone been working immediately prior to the accident, if you know? A. I don't know.

Mr. Ryan: Was he there before you?

A. Oh, Paul was there in '45 when I came. He was my foreman.

Libellant's Exhibit No. 4—(Continued)
(Deposition of Edward S. Bielski.)

Mr. Ryan: I see.

The Witness: But then he was laid off and he was called back. Then I am pretty sure he was laid off twice.

Q. (By Mr. Collett): Now, after the conversation which you told us about with the electrician, where did he go, did you notice?

A. I guess he went about his business.

Q. You don't know which direction he went when he left?

A. Really, I didn't look to see.

Q. You didn't look to see? You have no recollection? A. No.

Q. All right. Were there any other men around the area in which you were working?

A. Well, there were machinists. They were up on top of the davits.

Q. How many machinists were up there?

A. Well, there was St. Clair was one. Let's see. There was five of them.

Q. Were they from Ft. Mason?

A. Ft. Mason machinists.

Q. Did they have any interest in using power on the winch? A. None.

Q. How long would you say was the interval of time after the electrician left that you were relieved of your shift on the crank?

A. 15 or 20 minutes.

Q. 15 or 20?

A. I have no recollection of time at all.

Libellant's Exhibit No. 4—(Continued)
(Deposition of Edward S. Bielski.)

Q. Might just as well have been 5 minutes or 15 minutes, is that it? A. That is it.

Q. Well, maybe you could figure it by some other process. When the electrician came up, who was on the hand crank? A. No one.

Q. What? A. No one.

Q. No one?

A. The crank was taken out, laying on the deck. We never leave the crank in when we walk away from it.

Q. You don't leave the crank in?

A. No, sir.

Q. You don't?

A. The crank was taken out and laid on deck.

Q. Well, you hadn't started to use it then, at that particular point, had you?

A. No, we was waiting to see if we could get power.

Q. You had already accomplished winding up one-third? A. Correct.

Q. And the electrician came up, and then who put the crank back into the drum, would it be?

A. That's correct. I don't recall; I don't remember if I was first to start it or Dwyer or Vatuone. All I recall is, I was relieved by the two men when the accident happened.

Q. You don't recall how many shifts you might have participated in from the time that the crank was put back into its position, cranking position.

Libellant's Exhibit No. 4—(Continued)
(Deposition of Edward S. Bielski.)

until you were relieved and were walking away when the accident occurred?

A. I do not recall, no, sir.

Q. Your best recollection of that is about 15 minutes?

A. I would say about 15 minutes, yes.

Q. Now, you say you noticed a wire move after the accident, as though the motor had started again?

A. Yes.

Q. Do you know whether or not the motor started again?

A. I saw the wire move, but I don't recall the motor starting or turning, because I was kneeling alongside the man.

Q. Well, in other words——

A. But the wire moved.

Q. Well, whatever the action had been, the turn of the crank would have spun that way on the drum, too, wouldn't it; at the time that Vatuone was thrown, the wire was still connected to the drum, and then would have been wound at the same time, or unwound? A. That's right.

Q. Was it unwound or wound?

A. It was winding.

Q. It was winding and the action of the motor coming on and turning it, did it wind it or unwind it? A. Wound it.

Q. It wound? A. Wound it.

Q. Well, then, that was rather a forceful movement, wasn't it, so that—is that right?

Libellant's Exhibit No. 4—(Continued)
(Deposition of Edward S. Bielski.)

A. That's right.

Q. So that your observation of the wire moving might have been the reaction of the wire to the movement that had already occurred? Do I make myself clear? A. Yes.

Q. You didn't actually hear the motor start?

A. No, I couldn't recall hearing the motor start.

Q. All right. Did the ship's electrician come back to the area of the No. 5 lifeboat after the accident?

A. I was so interested at—well, wait a moment. I don't recall seeing anyone, because I was kneeling alongside Paul there and waiting for help to come. Next time I saw the man was in the captain's cabin. That was a good deal, quite a long time later.

Mr. Collett: That is all.

Redirect Examination

By Mr. Ryan:

Q. Are you going to be away from San Francisco in the next couple of weeks?

A. I will be back on the 4th of June. Why?

Q. Well, we have got to get this into the record. Are you on your vacation now? A. Yes.

Mr. Collett: On leave, is the proper term.

The Witness: Annual leave.

Q. (By Mr. Ryan): Annual leave. And are you going to be away from San Francisco during that annual leave? A. Yes.

Libellant's Exhibit No. 4—(Continued)
(Deposition of Edward S. Bielski.)

Q. And as you mentioned, you will be away until June 4, is that correct? A. June 4.

Mr. Ryan: I have just one other question in regard to the accident.

Q. After the accident had happened, did you observe the condition of the crank?

A. Laying on deck.

Q. Yes, and what was its condition? Was it any different than it was before?

Mr. Collett: Well, by "condition," what do you mean?

Mr. Ryan: I don't want to lead him——

Q. But you mentioned to me that the crank was twisted out of shape. Is that true?

A. That's correct.

Mr. Ryan: That is all I wanted to get. Thank you.

Recross-Examination

By Mr. Collett:

Q. Well, twisted out of shape in what respect?

A. Well, out of its original shape. It was bent.

Q. It was bent—which portion of it was bent?

A. I couldn't say, but I know it was bent.

Q. Well, where was it when you next saw it after you left and walked away?

A. Lying on deck alongside the winch.

Q. That is, after you had walked, turned your back, Vatuone arrived in the area of your feet, the next you saw the winch was——

Libellant's Exhibit No. 4—(Continued)

(Deposition of Edward S. Bielski.)

A. I didn't see that crank until I come back to the ship. I left the ship with Mr. Vatuone to go to the dispensary.

Q. Oh, you didn't?

A. When I come back, then I saw the crank laying there. I didn't observe where the crank was or what happened. There was a man injured on deck.

Q. Yes, I understand.

A. I was still with the man. I didn't look for the fault of the machine or anything else, where it was.

Q. Yes, I see. I was pretty sure that was what happened. When did you come back to the ship?

A. Well, I was gone a good hour.

Q. You were gone a good hour?

A. Maybe longer. We went over to the dispensary, then we stayed around until they put him in the ambulance and drove him to the hospital.

Mr. Collett: That is all.

Further Redirect Examination

By Mr. Ryan:

Q. Did that crank handle—was that a metal handle or a wooden handle?

A. It is made of steel, I guess.

Mr. Ryan: That is all.

Mr. Collett: That is it.

Libellant's Exhibit No. 4—(Continued)

State of California,

City and County of San Francisco—ss.

I certify that, in pursuance of stipulation of counsel, on Friday, May 19, 1950, before me, Anna T. Carroll, Notary Public in and for the City and County of San Francisco, State of California, personally appeared Edward S. Bielski, witness called on behalf of libellant in the above-entitled cause; and Messrs. Ryan and Ryan, represented by Thomas C. Ryan, Esq., appeared as proctors for libellant in the above-entitled action, and Mr. Frank J. Hennessy, Esq., United States Attorney, represented by Charles E. Collett, Esq., Assistant United States Attorney, appeared as proctors for respondent in the above-entitled action; and said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid, did thereupon depose and say as appears by his deposition hereto annexed.

I do further certify that the deposition was then and there taken down in stenotype notes by Eldon N. Rich, a competent official stenotype reporter and a disinterested person, and thereafter reduced to typewriting; and I further certify that by stipulation of the proctors for the respective parties, the reading over of the deposition to the witness and the signing thereof was expressly waived.

And I do further certify that I have retained the said deposition in my possession for the purpose of

Libellant's Exhibit No. 4—(Continued)

delivering the same with my own hands to the Clerk of the United States District Court for the Southern Division of the United States District Court for the Northern District of California, the court for which the same was taken.

And I do further certify that I am not of counsel, nor attorney nor proctor for either of the parties in said deposition and caption named, nor in any way interested in the event of the cause named in said caption.

In Witness Whereof, I have hereunto set my hand in my office aforesaid this day of, 1950.

.....,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed May 25, 1950.

Mr. Ryan: Mr. Bush, please.

ANTHONY BUSH

called as a witness on behalf of the Libellant, being first duly sworn, testified as follows:

The Clerk: Will you state your full name to the Court, [37*] please?

A. Anthony Bush.

Direct Examination

By Mr. Ryan:

Q. Where do you live, Mr. Bush?

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Anthony Bush.)

A. Westinghouse Electric Corporation.

Q. I mean, is your residence in San Francisco?

A. San Francisco, oh, yes, sir. 68 Walter Street.

Q. You are employed by the Westinghouse Electric Company? A. Yes.

Q. And in what capacity are you employed by that Company? A. Field Supervisor.

Q. Generally speaking what are your duties as a Field Supervisor for Westinghouse?

A. Well, I dispatch the men to various jobs and take care of the paper work for that particular job.

Q. What is your profession?

A. Well, I have got a professional license.

Mr. Collett: Will you speak up a little bit, please?

A. I have a state of California professional license of Electrical Engineer.

Q. (By Mr. Ryan): You are an electrical engineer, licensed as such by the State of California, are you? A. Yes.

Q. How long have you been an electrical engineer?

A. Well, I have been working in that profession since 1937. [38]

Q. Since 1937 to date have you been working continuously in your profession of electrical engineer? A. Yes, sir.

Mr. Collett: I will stipulate that he is with Westinghouse, qualified for whatever he is going to testify, to save time. I don't know whether he is.

The Court: It isn't too extended, is it?

(Testimony of Anthony Bush.)

Mr. Ryan: No, it isn't.

Q. (By Mr. Ryan): Did you attend any colleges, Mr. Bush?

A. Rensselaer Polytechnic Institute, New York.

Q. Rensselaer Polytechnic Institute, Troy, New York?

A. Yes, sir. It is an engineering school.

Q. That is exclusively an engineering school?

A. Yes, sir.

Q. How long did you attend Rensselaer Polytechnic Institute?

A. Three and one-half years total.

Q. How long have you been employed by Westinghouse? A. Since 1944.

Q. And have you been employed continuously by them since 1944? A. Yes, sir.

Q. In all that time as an electrical engineer?

A. Yes, sir.

Q. Who are you familiar with and have you had experience with electric currents and electric switches?

A. That is kind of a broad question. Yes, I have done a lot [39] testing on various of our electrical apparatuses.

Q. Have you had experience in testing Marine electrical apparatuses on board ships and have you got Westinghouse Electrical equipment on board Government transports?

A. Yes, some of them have quite a bit of Westinghouse equipment.

(Testimony of Anthony Bush.)

Q. Have you had experience in installing and repairing that equipment? A. Yes, sir.

Q. Have you had experience in testing that equipment for defects of any kind?

A. Yes, sir.

Q. All right. Now, following this accident did you make an investigation to determine if there was any defect in the electrical equipment on board the General Altman?

A. The following day, yes, sir.

Q. The following day? You went on board the ship, did you? A. Yes, sir.

Q. Did you expressly test the electrical equipment that would operate the motor of the number 5 winch or number 5 lifeboat? A. Yes, sir.

Q. Will you please tell the Court whether or not you found any defects in that equipment?

A. No, sir. [40]

Q. Now, so we will understand this matter, could you please tell us where the electricity originates and where it goes in order to start the motor of the number 5 winch?

A. Well, to start off with, the current is fed through a knife switch.

Q. Pardon me?

A. The current is fed through a knife switch, from the generator through the knife switch. There is a control handle there and from the control panel there is a circuit goes to the dead man switch and also to two limit switches, then from there this circuit feeds a contactor which is in the control box.

(Testimony of Anthony Bush.)

Q. Well, so we will understand that I might interpolate a little more clearly, you say the current is fed from the panel? A. That is right.

Q. Where is the panel located?

A. That is about three decks below.

Q. Down in the engine room?

A. Down in the engine room, yes, sir.

Q. Then you say, if I understand your testimony correctly, that the current would go from the generator up to the control panel on deck?

A. That is right.

Q. When you say the control panel on deck, where is that control panel situated in relation to the winch of the number 5 lifeboat? [41]

A. It is in a housing about 30 or 40 feet away from this particular boat davit.

The Court: You are referring to Libellant's Exhibit 3, Mr. Ryan?

Mr. Ryan: Yes, thank you.

Mr. Collett: Well, if the Court please, not having to go around a lot of words here and generalize, I have no doubt Bush is familiar with it, and it takes a whole hour's time here and perhaps if he would take a look at this we could save considerable more hours.

Mr. Ryan: I may avail myself of that, but I want to straighten myself out on those matters so that I may understand it, and your Honor also.

Q. (By Mr. Ryan): In regard to this control panel, you say that is on the same deck as this motor and 30 or 40 feet away, is that correct?

(Testimony of Anthony Bush.)

A. Approximately, yes.

Q. Is there any fixed object in the way of it that would prevent a man standing at the control panel from seeing men operating the winch by hand?

A. From the control panel, you mean?

Q. Yes.

A. It is impossible to see anyone at the winch from the control panel for it is in a housing behind a closed door and you would have to open the door and go back into a corner, and [42] it is impossible to see for it is in the opposite direction from where you could look out through that door.

Mr. Collett: If the Court please, again in Exhibit 2, is a picture of the Aultman, and I am personally standing in front of the entrance of that control board here, for counsel's information, so we can save some time for the Court. It seems to me there are matters here we can dispose of very readily.

Mr. Ryan: I won't be long. I would like to do it my own way. Maybe counsel can cross-examine on that if he wishes.

Q. (By Mr. Ryan): From the control panel you say the current would go into a dead man switch, is that it?

A. Well, that is the controlled circuit. The controlled circuit goes to the dead man switch.

Q. Where is the dead man switch located?

A. Well, it is right along side of the motor so that you could at the same time go down below to

(Testimony of Anthony Bush.)

see when the boat is ready. The man has control of the lifeboat from the dead man switch.

Q. When you say "dead man switch," do you mean a switch where you have to keep your hand on the switch in order to keep it operating?

A. That is right.

Q. If you don't keep your hand on the switch will the switch operate?

A. That automatically breaks the current. [43]

Q. Then you mentioned—so your Honor will understand—two limit switches. Please tell us where they are located.

A. These limit switches are located between the runways of the lifeboats, one on either side.

Q. How high above deck are they?

A. About ten feet above deck. Eight or ten feet.

Q. What is the function of these limit switches?

A. These limit switches, as the boat gets up to its position at its nest they automatically cut the current on the motor and stop the motor.

Q. That is to prevent the boat going too high and busting everything up above overhead.

A. That is right, sir.

Q. When the boat goes there and reaches its cradle the limit switches automatically shut off?

A. It is just before it gets to the nesting point when it shuts off. It is adjusted so that it shuts off about, oh, I would say eight or ten inches before it reaches its nest.

Q. Now, let me ask you this: Assuming number

(Testimony of Anthony Bush.)

5 lifeboat, let us say, on the day of the accident was in its nest. Let's assume further that no one was manually holding his hand on the dead man control switch on the rail, or wherever it was. Now, what is the only method of starting the motor on the number 5 winch under those circumstances?

Mr. Collett: Well, if the Court please, I am going to [44] object to that, what was the only method. There is nothing to indicate whether there is an only method, and to assume whether or not there is any method or methods, but the question includes "the only method."

Mr. Ryan: I will take that amendment.

Q. (By Mr. Ryan): Tell us, what is the method of starting the motor on the number 5 winch?

A. Well, this dead man switch operates a solenoid on the contact board. In other words, it energizes this solenoid when the contactor is pulled, makes contact, and that feeds power to the motor.

Q. Well, if the motor is—assuming that the motor is not operating. Assume further that two men have a crank at the winch and are winding the cable around the drum of the winch, turning that drum manually by hand. If that is so, what would a person have to do to start the motor on that winch?

A. Well, the first thing, the knife switch would have to be closed and the conductor would have to be energized.

Q. The knife switch would have to be closed and what else?

(Testimony of Anthony Bush.)

A. And the solenoid on this container would have to be energized.

Q. What is that word? A. Solenoid.

Q. Would have to be energized? Now, where is this knife switch you are talking about [45] located?

A. That is on the panel, at the control panel.

Q. That is the panel you have told us about which is 30 or 40 feet away from this winch and on the same deck? A. Yes.

Q. You say the knife switch would have to be pulled? What would a person have to do to pull the knife switch?

A. Well, he would have to, first of all, get into the compartment and open the panel. The panel is an enclosed panel. He would have to open that and manually close the knife switch.

Q. And that switch is merely like any other electric switch, just move it? A. That is right.

Q. Then you say if you did that the solenoid would be energized? A. No, sir.

Q. What? A. No, sir.

Q. How do you energize the solenoid in that panel?

A. You would have to, first of all, before you could do that, you would have to bypass the limit switches and the press the dead man switch.

Q. Supposing the lifeboat is in the nest, that would eliminate the limit switch?

A. That is right.

(Testimony of Anthony Bush.)

Q. If no one is holding down the dead man switch, that would [46] eliminate that switch?

A. That is right.

Q. Therefore, is it true a man at the panel could turn on the electricity for that motor by shoving in the panel?

A. Manually closing the contactor, yes, sir.

Q. Did you ascertain in your investigation that it was the duty of the ship's electrician to stay right by that panel during an entire lifeboat drill?

A. No, I did not.

Mr. Collett: I object to that, what would have been the duties of the electrician, so far as this witness is concerned.

Mr. Ryan: Well, we will have the electrician's deposition for that.

The Court: All right.

Q. (By Mr. Ryan): I don't know if I understand that. Is that a hard thing to do? If a man is standing by the panel, is it hard to start that motor? Does he merely have to press the switch?

A. It isn't a switch, sir. The contactor is not a switch that does—it isn't made for pressing manually at all.

Q. By that I mean is it much of an operation to turn on the electric current?

A. Well, you would have—this particular contactor is a magnetic contactor and just a plate whereby as soon as a solenoid is energized you would poke this plate in, so by [47] pushing the

(Testimony of Anthony Bush.)

plate in you automatically make contact at the main motor.

Q. By pushing the plate, is it something that could be done just like pushing one of these buttons over here in the Courtroom?

A. It isn't as simple as that, no.

Q. How do you push this plate to start the electricity? Do you do it with a tool or by hand or what?

A. You could push it in with your finger or a pencil or——

Q. Let me ask you this question, which I think is very important, your Honor, in this case: You as an electrician, do you know if there is any other way of starting the motor at that number 5 winch other than you have indicated?

A. I don't know of any other way, sir.

Mr. Ryan: No other way. That is all, your Honor.

Cross-Examination

By Mr. Collett:

Q. Well, somebody using the dead man switch, with the knife switch in place it would start the motor, wouldn't it?

A. Not if the limit switches were not by-passed. If the boat was in the nest and the limit switches were operating—they were in proper adjustment when I examined them. The dead man switch could not operate the motor with the boat nested.

Q. Under what circumstances can you operate the motor with the boat nested? [48]

(Testimony of Anthony Bush.)

A. By throwing in the knife switch and closing this contactor manually.

Q. In other words, in any situation in which the lifeboats have been nested and this wire is being strung and these men utilized power to wind up the wire onto the drum, what has been the process by which they could utilize the power?

Mr. Ryan: Just a moment, your Honor. If I understand that question correctly he is asking this witness to assume the men had used power to wind the cable on the drum, and I think the testimony is to the contrary, that they did it by hand.

Mr. Collett: I said assuming that the wire had been run and the men were winding that wire back on the spool, the lifeboats nested, what would be the process whereby they would utilize the power.

Mr. Ryan: Just a moment. I object to that on the ground that it, number one, assumes something not in evidence, and, number 2, he is asking the witness for a question as to what might have happened which didn't occur at the time of the accident. It injects a false element in the case.

The Court: Well, he may answer.

Mr. Ryan: All right.

A. The solenoid cannot be operated with the boat nested. And the limit switches in position, which would automatically cut the current to the solenoid. They would have to be [49] eliminated first.

Q. (By Mr. Collett): The limit switches would have to be animated first, you say?

(Testimony of Anthony Bush.)

A. Eliminated.

Q. What method is used to eliminate the limit switches?

A. Well, the only method I know of now, is just put the bumpers across the limit switches; in other words, by-pass the limit switches.

Q. Then when the lifeboats are nested if they put bumpers up there you can by-pass that and operate it from the dead man switch?

A. Yes, if the knife switch is in.

Mr. Ryan: If what?

A. If the knife switch is in.

Q. (By Mr. Collett): By your examination on the day after this accident you found all gear in perfect working condition, is that right?

A. That is right.

Q. No defect of any kind? A. No, sir.

Mr. Collett: That is all.

Redirect Examination

By Mr. Ryan:

Q. Here is something I want to find out. If I understand your testimony correctly, did you or did you not state this, that with the lifeboat—when the lifeboat is [50] nested you cannot start the motor by the dead man control, is that correct?

A. That is right.

Q. So, so far as this accident is concerned, we can eliminate the dead man control as a factor, can't we? A. Yes.

(Testimony of Anthony Bush.)

Q. Because even if the man did by his hand operate the dead man control, with the lifeboat nested that couldn't start the motor?

A. That is right.

Q. So we can skip that. I believe in your last answer that you gave Mr. Collett you stated that even if somebody put bumpers, which we have no evidence of, under the limit switches still the motor couldn't start unless somebody operated the knife switch?

A. The knife switch would have to be in, yes.

Q. When you say the knife switch would have to be in, does that mean the switch is in operation?

A. That is right.

Q. Does all this come back to the question that the only way you could start that motor is by operating the knife switch at the control panel?

A. Well, the knife switch is a stationary switch, which you know, you put it in and it stays in position. In other words it doesn't drop out when you shut off the current. When the [51] contactor power is off it automatically cuts out.

Q. To reiterate just once: I asked you before, there is no other way to start this particular motor of the number 5 winch except operation on the control panel on deck 30 feet away from the winch?

A. That is right. I would like——

Mr. Ryan: That is all.

A. ——to state one thing. When you asked the question before if I found any defects, there was one little screw that was loose in that limit switch,

(Testimony of Anthony Bush.)

but it had nothing—it was just simply loose, about a quarter of a turn loose.

Recross-Examination

By Mr. Collett:

Q. Is that the control panel?

A. Looks similar to it.

Q. That is the control panel, isn't it?

A. It is a similar control, yes, sir.

Q. Could you identify that photograph?

A. Yes, sir, that is the control panel.

The Clerk: Are you offering this, Mr. Collett?

Mr. Collett: Yes.

Q. (By Mr. Collett): There isn't any way you could identify that? A. No, sir.

Mr. Collett: Do you want to stipulate that was taken on the 15th of September on the [52] Aultman?

Mr. Ryan: Did he identify that?

Mr. Collett: Yes.

Mr. Ryan: Then I will stipulate.

(Exhibit was marked Respondent's Exhibit A, in evidence.)

Mr. Collett: The same for this?

Mr. Ryan: Yes.

(An Exhibit was marked respondent's Exhibit B, in evidence.)

Q. (By Mr. Collett): Would you please indicate on Respondent's Exhibit B the knife switch?

(Testimony of Anthony Bush.)

A. This is the knife switch (indicating).

Mr. Ryan: Pardon me, could I see where he pointed?

Mr. Collett: Yes. He pointed to the top of the photograph. It has written on it, looks like——

Mr. Ryan: “Discontinuing switch.”

A. Disconnecting switch, probably.

Mr. Collett: Disconnecting switch. That is written on there.

Mr. Ryan: Could he mark it with an S, if I might suggest, to the knife switch, because we refer to it so much.

Mr. Collett: All right, mark them where you want. There are two knife switches.

A. No, one.

Mr. Ryan: Put it on the one knife switch.

A. This is——

Q. (By Mr. Collett): Well, the knife switch doesn't identify [53] anything except a certain type of switch, doesn't it?

A. That is right. Disconnecting switch.

Q. Actually a designation of that particular switch that's all.

A. A disconnecting switch.

Q. A disconnecting switch, physically a knife switch, is that right? A. That is right.

Q. And the switch you have indicated with a mark “X,” and which has writing on the side, “Disconnecting switch” at the top of the photograph, Respondent's Exhibit B, that is operated manually?

(Testimony of Anthony Bush.)

A. Manually. There is a handle above it and you just pull that handle.

Q. Could you indicate on there what the main contactor is?

A. This is the main contactor here.

Q. Would you put, say, a letter to indicate the main contactor? A. I will put "M and C."

Q. And this solenoid, would you indicate the solenoid on there, too?

A. It is right behind this here (indicating). You can't see it.

Q. The solenoid is behind the main contact?

A. Right straight under here. It isn't visible.

Q. Now, this process whereby you eliminate the limit switch, it is possible, as I understand your testimony, by jumping the [54] limit switch to operate the motor that drives the winch by the dead man switch, is that right?

A. Well, doesn't operate it direct because it is operated through this contactor. In other words, the limit switches simply interrupt a circuit to the solenoid to that main contactor.

Q. The limit switch interrupts the circuit from the dead man switch to the contactor?

A. That is right.

Q. Now, the conditions that have to be present, then, would have to be that the disconnecting switch would have to be in? A. Yes.

Q. Then you would have to do something to jump the limit switch? A. Yes, sir.

Q. And if that is done, even though the life-

(Testimony of Anthony Bush.)

boat is in position, you can operate the motor from the dead man switch? A. Yes, sir.

Mr. Collett: That is all.

Redirect Examination

By Mr. Ryan:

Q. Mr. Bush, assume the men are out working the winch and the drum by hand. Assume the lifeboat is in its nest. What is the only way of starting that motor?

Mr. Collett: Oh, if the Court please, we have been all over this three or four times. The witness has cross-examined, [55] re-examined, and recross-examined. He is just going all over the same questions.

The Court: All right.

Mr. Collett: I further object to the question. He is again using the word "Only."

Mr. Ryan: He has already said that.

The Court: Go ahead.

Mr. Collett: He has testified to the contrary.

A. The disconnecting switch or knife switch would have to be closed. In other words, to vary the current it would have to have that main contactor in the closed position.

Q. (By Mr. Ryan): Is there any other way of starting that motor?

A. No, sir, outside of that.

Q. That is right, I show you Respondent's Exhibit B, and you have indicated the limit switch on there by two metal handles.

(Testimony of Anthony Bush.)

A. Copper handles.

Q. Now, with the lifeboat in its nest we can eliminate the dead man control, you say, and not having anything to do with operating the motor?

A. That is right.

Q. Suppose there is a man at the controls and he wanted to start that motor, what would he do with that limit switch? Would he pull that out or would he push it in, that contactor? [56]

A. That limit switch?

Q. No, no, no. These two switches.

A. He would have to have that in. That doesn't come out of its own accord. That stays wherever you have it, either closed or open.

Q. In order to start that motor, would a man push it in or would he pull it out?

A. This knife switch would have to be pushed in.

Q. Would he have to do anything else?

A. Well, with that in, then he would have to push this in here.

Q. Push a button?

A. No, that is not it. That's got all these contacts on it.

Q. Push the plate in, you mean? A. Yes.

Q. One plate? A. Yes.

Q. Could that be done—so that we understand it, could that operation be done in, say, five seconds?

A. Well, you would have to open the panel upstairs.

Q. Assuming the panel is opened and the man

(Testimony of Anthony Bush.)

standing there, could he perform that operation to start that motor of the number 5 winch in five seconds?

A. Just as quickly as takes me to reach his hand up there and push it in.

Q. Then is the answer yes or no, he could do it in five seconds? [57]

A. Oh, yes, he could if he is standing there.

Mr. Ryan: That is all.

Recross-Examination

By Mr. Collett:

Q. Mr. Bush, is that the usual or an unusual procedure? A. Very unusual.

Q. Very unusual? A. Yes.

Q. For an electrician it would be extraordinary, wouldn't it?

Mr. Ryan: I object to that on the ground that calls for a conclusion and opinion.

The Court: I will allow it. He is an expert.

Mr. Collett: Read the question.

(Question read by the Reporter.)

A. Yes, sir.

The Court: Is that all?

Mr. Collett: Just possibly one more question:

Q. (By Mr. Collett): I am trying to understand what you have in mind when you, in response to counsel's question, use the term "only way." I understand with that switch in, the knife switch, disconnecting switch, if you jump the limit

(Testimony of Anthony Bush.)

switch, then the motor can be operated from the hand rail? A. Yes.

Q. Obviously that hand switch is kind of a master switch? [58] A. That is right.

Q. That has to be in to get any juice at all.

A. That is right.

Q. Now, the knife switch, the disconnecting switch being in, this extraordinary procedure of poking a finger or pencil or something in this main contactor might start it, or if the limit switch is jumped and it is operated from the hand rail, from the dead man switch, is that right?

A. That is right.

Q. That is what I understand your testimony to be?

Redirect Examination

By Mr. Ryan:

Q. I don't understand your testimony that way. You mean a man could climb aloft underneath the lifeboat in its nest and work a switch from up there? A. No, sir.

Q. That is what counsel thinks you mean, I think. A. No, sir.

Q. Which and what did you mean when you answered his last question?

A. When we talked about jumping a switch we mean by simply taking the two pieces of wire and bringing the wire around the switch to by-pass the switch. That is how we call jumping the switch. Manually that could not be operated because we would have to lift the bolt up. [59]

(Testimony of Anthony Bush.)

Q. In order to perform that operation Mr. Collett is talking about you would have to lift the boat up?

A. You would have to get the boat out of that position because the weight of the boat is pressed down on the limit switches and disconnects the main contactor.

Q. When you made your investigation, Mr. Bush, the next day, was the boat, so far as you know, in the same position it was at the time of the accident or had it been moved?

A. When I was there it was in the next.

Q. It was in the next? A. Yes, sir.

Q. Were all the cables in their shivs?

A. Yes, sir.

Q. Here is what I want to understand: Do I understand correctly if the lifeboat is in the nest you are unable to perform that operation of jumping the limit switches, is that correct?

A. Manually. You have to do it physically with a wire, which is not any procedure to do. I mean, it isn't the correct procedure.

Q. Of course you had no evidence anyone did that, did you? A. No, sir.

Mr. Collett: Oh, I object to this, if the Court please.

Q. (By Mr. Ryan): If you had a lifeboat in the nest and if somebody had gone through that extraordinary procedure of [60] putting a wire to jump the limit switches, how would these men even

(Testimony of Anthony Bush.)

under those circumstances up there at the limit switch start the motor?

A. The same man? It would be impossible. He couldn't reach it.

Q. Then is there any way of operating the limit switch underneath the lifeboat, with the lifeboat in its nest, is there any way to make energy go from there to the motor directly from the limit switch?

A. No, sir.

Q. Then I don't understand what you mean by answering Mr. Collett's question that you could by jumping the limit switch start the motor from the limit switch underneath the lifeboat.

Mr. Collett: He didn't say that.

A. No, I stated from the dead man switch, is what I understood him to say.

Q. Oh, I see what you mean. In other words, if somebody went through the extraordinary procedure of putting a wire underneath the limit switch——

A. There are two of them limit switches, incidentally.

Q. Two of them operate in one lifeboat?

A. Yes.

Q. He would have to do that for both switches?

A. That is right.

Q. If somebody did that, and if somebody went over to the [61] dead man control on the rail and held his hand on it, then he could have started the motor?

A. Yes.

Q. But you would have to have those three fac-

(Testimony of Anthony Bush.)

tors present jumping both limit switches and holding your hand on the dead man control?

A. Yes, and the disconnecting switch would have to be in.

Q. Yes, those so-called knife switches in the control room?

A. Yes.

Mr. Ryan: That is all.

Mr. Collett: That is all.

(Witness excused.)

Mr. Ryan: Mr. Sinclair, please.

The Court: Gentlemen, I have had a long day. Can this witness come back tomorrow?

Mr. Ryan: I wonder if we might eliminate one witness maybe by stipulation before we conclude? I have Mr. Brown from Westinghouse. He is one of the helpers. He wasn't in electrical engineering, but he helped this last witness to make the test and found nothing wrong with the electrical equipment.

Mr. Collett: Well, I will stipulate there was nothing wrong with the electrical equipment.

Mr. Ryan: Then he won't have to come back.

The Court: When you say there was nothing wrong with the [62] electrical equipment, you mean in principle?

Mr. Ryan: They made tests to find out if there was anything, any defect in it that might cause this accident, and found nothing.

The Court: I tried an electrical case here and I have been through this electricity business three or four times. What is your theory, Mr. Collett, as to how it happened?

(Testimony of Anthony Bush.)

Mr. Collett: If the Court please, I don't know. I don't know just how the thing could happen. It seems to me it just might be deliberate. The witnesses testified that by sticking a finger in that main contact that you could cut through the dead man switch and the limit switch, but——

The Court: Well, you could apply that to the disconnecting switch. Either there was negligence or *res ipsa loquitur*. This thing just didn't happen. I have been through too many of these things. I am not too much concerned as to that aspect. I don't want to prejudge matters, but I have been all through them. There isn't much question. This man was killed.

Mr. Ryan: That is right.

Mr. Collett: No question about that.

The Court: He didn't commit suicide and no one murdered him.

Mr. Ryan: No.

The Court: I am satisfied of negligence. Where do we start from there? [63]

Mr. Ryan: Then I will put the widow on in the morning and her testimony won't take five minutes.

The Court: All right. Adjourn until tomorrow morning, ten thirty in the morning. At ten thirty we will go ahead.

(Thereupon this cause was adjourned to Friday, May 26, 1950, at the hour of 10:30 a.m. and thereafter further adjourned to June 6, 1950.) [64]

June 6, 1950—10:00 A.M.

The Clerk: Case of Rina Maria Vatuone vs. the United States, on trial.

Mr. Ryan: Ready, your Honor.

Mr. Collett: Ready.

Mr. Ryan: If it please your Honor, you will recall when this trial came up the last time your Honor made the statement that it looked to the Court at that stage of the proceeding that this was a *res ipso loquitor* case. I have done a little research on the law since that time and I have come to that conclusion, but in order to bolster this and to prove exclusive control on the part of the defendant of the panel that operated the switch for light No. 5, I want to offer in evidence a deposition of Henry W. Chandler, the ship's electrician, who had charge of the whole thing, which was taken on September 8, 1949, by myself on behalf of the Plaintiff.

Mr. Collett: Objected to, if the Court please. It was objected to at the time of the deposition that it was noticed under the wrong rule, and there is no showing here of compliance with the provisions of Section 639, Title 28, and it cannot be introduced in evidence, if there is no showing that the witness is not available.

Mr. Ryan: In answer to that I wish to say that United States Code, Title 28, Section 639, has to do with depositions *be bene esse*, which is still the rule in Admiralty. It merely provides that reasonable notice must be given to the opposition. [65] In the file we have the written notice of taking this

deposition which shows the notice to take the deposition is dated September 6, and the deposition was noted for September 8, two days later. Furthermore, your Honor, Mr. Collett on behalf of the Government appeared at the taking of the deposition and sat throughout the entire deposition. So first I contend that the notice of taking deposition was adequate because it was on two day's notice——

The Court: There was a decision that came down from Pennsylvania in the last several months. It appeared in the advance sheets of the Federal Rules Decision bearing upon depositions in Admiralty. The decision escaped my notice, I think you will find it, Mr. Collett, in more recent decisions. Who is this witness?

Mr. Ryan: This witness is the ship's electrician, the man who actually pulled the switch.

The Court: Where is he now?

Mr. Ryan: First I wish to say this: At that time we took his deposition on the ground he was leaving to go to sea, and he stated there he was going to sea. As far as I know, he is at sea. He is a marine electrician. He is not a shore side worker.

Mr. Collett: If the Court please, it was objected to at the time especially and consistently at the beginning of the deposition that the deposition was being taken not in accordance with [66] the proper rule. It appeared from the preliminary questions the witness would be gone for only a period of one month. In addition to the other objection, there is no showing here he is at sea, he is not outside

the jurisdiction of this Court to the extent of one hundred miles, or he has since ceased to be. There has to be some showing.

Mr. Ryan: I think your Honor has discretion in the matter and that an inference can be drawn from the fact that he is a seafaring electrician, that he is making regular trips to sea, and furthermore the Government should have him here if he is in San Francisco because he was their chief actor as far as this accident is concerned.

The Court: Before Mr. Collett urged substantially as follows. He objected to the deposition on the ground, one, that it was premature, that is, the taking of the deposition was premature, and on the further ground that the notice did not specify any of the conditions of Section 639, Title 28 of the U. S. Code. According to the notice the witness is a resident of the City and County of San Francisco. There has been no showing that he will not be here at the time of the trial, and Mr. Collett stated, "I have noted an objection in this case that it is premature to take a deposition." At this time I have nothing on the case, and that objection, of course, is not valid. I think as a matter of precaution, so there will be no possible claim hereafter of abuse of discretion on [67] my part, a determination be made as to the present whereabouts of this witness.

Mr. Ryan: Yes, your Honor. We may do that very quickly.

The Court: If the witness Chandler is absent from the jurisdiction, of course I will take the deposition and have that in the record.

RINA MARIA VATUONE

was called as a witness and testified as follows,
sworn:

Direct Examination

By Mr. Ryan:

Q. Where do you live, Mrs. Vatuone?

A. At 4452 Arlington Avenue, Santa Rosa.

Q. And at the time of your husband's death where did you live?

A. At 3350 Broderick Street, San Francisco.

Q. Were you appointed by the Superior Court of the State of California in and for the City and County of San Francisco, administratrix of the estate of Paul D. Vatuone, deceased?

A. Yes, I was.

Mr. Ryan: Your Honor, at this time I offer in evidence a certified copy of her letters of administration in that estate.

Mr. Collett: I would just like to take a look at it.

(The document was handed to Mr. Collett.)

Mr. Ryan: No objection, counsel states.

The Court: It may be marked.

(The certified copy of the letters of administration referred [68] to above was marked Libellant's Exhibit No. 1 in evidence.)

Q. (By Mr. Ryan): What was the relationship between you and Mr. Vatuone? Was he your husband?

A. Yes, he was.

Q. When and where were you married?

(Testimony of Rina Maria Vatuone.)

A. We were married at St. Finnebar's Church in San Francisco, on November 15, 1936.

Q. Were there any issue of said marriage, any children? A. Yes, there was a daughter.

Q. What is your daughter's name?

A. Paulette Vatuone.

Q. How old was Mr. Vatuone when he died?

A. 44.

Q. How old were you at the time of his death?

A. 37.

Q. And how old is your daughter Paulette at the time of his death? A. She was seven.

Q. Did you and Mr. Vatuone live together as husband and wife continuously from November 15, 1936, to the date of his death, June 15, 1949?

A. Yes.

Q. A period of almost 13 years.

A. Yes, that is right.

Q. Will you please tell his Honor what type of husband Mr. [69] Vatuone was?

A. He was a very good husband.

Q. Maybe I can help you a little bit. When you say he was a very good husband, did he work steadily?

A. Yes, he did. He was a good provider.

Q. Was he a sober man or an intoxicated person?

A. No, Paul never drank.

Q. He never drank at all? A. Never.

Q. Did he work, for instance, all through your married life? A. Yes, he did.

(Testimony of Rina Maria Vatuone.)

Q. Were you dependent upon him for your support? A. Well, yes I am.

Q. And was your daughter dependent upon him for support? A. Yes.

Q. How long had he worked for the United States Government at Fort Mason?

A. He worked from the beginning of 1942 'til November, 1946, and then he worked from November, 1946, until the end of 1947 for Sherry Liquor Stores.

Q. Yes?

A. And then he was again employed by the Fort Mason in 1948 and 1949.

Q. All right. Let us take 1949, the year that he died. He died on June 15 of that year, didn't he? [70] A. Yes.

Q. How much was he making from the Government during that year? How much a month?

A. It must average about—I can give you the round figures. The average I don't know. From the income tax notation that they sent me he had earned in 1949 a total of \$1448.

Q. \$1448—that is for six months of 1949?

A. Yes.

Q. Let me ask you this: In addition to his work for the Government at Fort Mason, did he augment his income by other work?

A. Yes, he had a part time job at the Murphy Liquor Store on Chestnut Street.

Q. Did he work there at night? A. Yes.

Q. He worked for Murphy's Liquor Store dur-

(Testimony of Rina Maria Vatuone.)

ing May and June, I understand, of 1949, didn't he?

A. Yes.

Q. How much did he earn in May at Murphy's Liquor Store?

A. It was \$56 and some odd cents.

Q. And how much did he earn in the two weeks of June that he lived?

A. \$42.40, I think it was.

Q. So between the two jobs, that is, working for the Government at Fort Mason and working for Murphy's Liquor Store, would [71] you say he averaged about \$300 a month? A. Yes——

Mr. Collett: I object to that, if the Court please. The figures speak for themselves.

The Witness: It is around \$300 a month. A little over that, I think.

Q. Let me ask you this: How much did he earn the entire year of 1946, for instance, where he worked for Sherry's Liquor Store?

A. I have the figures here. May I refer to them?

Q. Yes, I wish you would.

A. In 1946 he worked November 14th to December 31st and had a gross earning of \$478.20.

Q. That was for six weeks? A. Yes.

Q. How about 1947?

A. And for the full year of 1947 his earnings were \$3669.92.

Q. Tell me about Mr. Vatuone's health. What was the state of his health before he was killed?

A. Paul was in very good health.

(Testimony of Rina Maria Vatuone.)

Mr. Collett: I will object to that as calling for the opinion and conclusion of the witness.

Mr. Ryan: She could observe him.

The Court: Overruled.

A. Paul was in very fine health. [72]

Q. (By Mr. Ryan): For instance, take the year or two or three even before his death: Had he had any serious illnesses? A. No.

Q. Did he ever have any serious illness in his life while you were married to him?

A. In his married life, nothing, and just prior to our marriage he had his tonsils out and that was the only time he was sick to speak of.

Q. During your thirteen years of marriage did he work daily with the exception of Sundays, Saturdays and holidays?

A. Oh, yes, yes, he was always employed. At least if he were not employed he was out looking for it.

Q. How about his parents? Were they long-lived people or short-lived?

A. His father died—the age of the father was 45. In 1920 his father died. His mother is still living. She is a widow.

Q. How old is she about?

A. She is up in her seventies. I think she is 76.

Q. Do you know what his father died of at 45?

A. No, I am sorry, I don't know.

Q. That was many years ago—1920?

A. 1920.

Q. Generally speaking, you have shown us here

(Testimony of Rina Maria Vatuone.)

where his earnings for the last several years have approximated \$300 or thereabouts. During the 13 years of his marriage had his [73] earnings been more or less steady? I mean around that level or were they more or less?

A. During the war years his earnings were more than that because there was a lot of overtime.

Q. How much did he earn during the war years?

A. In the neighborhood of \$4000 and better. I am quite sure it was that.

Q. And then I suppose during the 1930's they were lower?

A. Yes, they were.

Q. Now, let me ask you this: in regard to his relations with your child, did he show affection for the child?

A. She was very dear to him.

Q. Did the child reciprocate that and show affection to him?

A. Yes, she did.

Q. And was he good to you?

A. Yes, he was.

Q. And now, let me ask you this on another subject matter, Mrs. Vatuone: he died on June 15, 1949, didn't he?

A. Yes, he did.

Q. Within a short time of that time did you hear from anyone connected with Fort Mason as to what your rights were or as to what you should do under the circumstances?

A. I was told to get in touch with a Mr. Sutherland at Fort Mason.

Q. When were you told that? [74]

A. The week following the funeral.

Q. Who told you to do that?

(Testimony of Rina Maria Vatuone.)

A. Well, this receptionist at the hospital that notified me of Paul's death.

Q. Where was he taken? To the Marine Hospital?
A. Yes, he was.

Q. And the receptionist at the Marine Hospital told you to contact Mr. Sutherland at the Marine Hospital?

A. Yes. I was upset at the time and she said, "He will tell you where to go and help you out." And so I contacted him the following week.

Q. You went out to Fort Mason and contacted Mr. Sutherland?
A. Yes.

Q. Did you have a conversation with Mr. Sutherland?
A. Yes, I did.

Q. That was about a week after your husband's death?

A. Yes, it was the following week. The funeral was on Saturday and I started to work on it the following week.

Q. This was at the United States Government office at Fort Mason, was it?

A. I believe the building number was 207.

Q. Was anyone else present besides Mr. Sutherland and yourself when you had this conversation that you are about to relate?

A. Well, there were other office workers in the office but they were busy with their own work. They were not talking directly [75] to me.

Q. Were you seated at Mr. Sutherland's desk when you had this conversation?
A. Yes.

Q. What did Mr. Sutherland say to you?

(Testimony of Rina Maria Vatuone.)

A. Well, he said that he was at my disposal as to helping me with these various government forms that were to be filled in, and he asked me personal questions as to my children and myself and my husband, and then I was to make application for compensation and for whatever benefits were to be given to me.

Q. Did he prepare any forms of application for compensation for you to sign at that time or did that come in at another time?

A. As I remember correctly, he put down the information and then said that his office worker would type it for me and then I could sign it.

Q. Did you sign anything that day?

A. No, I came back the second time.

Q. Have you related all the conversation that occurred on this first visit?

A. Well, I can't remember all of it, but I could remember the important sections of it.

Q. Have you related all of the important sections of it?

A. The thing that I wanted to know was in the event that I brought suit, would the claim for compensation affect it in [76] any way, and I was told, well, whatever the award would be, the amount of compensation I would receive in the interim would be deducted from that award and I would be allotted the remaining amount.

Q. Did you have any knowledge personally yourself at that time as to what the law was with regard to your rights in this matter?

(Testimony of Rina Maria Vatuone.)

A. No, I myself did not, so I contacted my attorney, Mr. Robert McMahon, to help me out.

Q. How long was it after that that you contacted Mr. McMahon?

A. I think it was the week following that.

Q. Did you believe the statements that Mr. Sutherland told you, that is, that you had the right to make application for compensation and also bring suit, and the compensation award would be deducted from the amount that you recovered in the suit? Did you believe those statements of his to be true?

A. Yes, I believed it because he seemed to be a person in the service. There was no reason for him not to tell me what was right.

Q. Did you, so far as you know, come back another time and sign an application for compensation?

A. Yes, I did.

Q. Do you know when it was that you did sign this application?

A. It was around the 23rd of that month, if I am right. I have no recollection of the exact date. [77]

Q. After you contacted Mr. McMahon—that is Mr. Robert McMahon sitting here, is it not?

A. Yes, it is.

Q. As your attorney, then you ascertained that he had some conferences with myself, didn't you?

A. Yes.

Q. Afterwards were you informed by your attorneys that you could do both, that is, accept compensation and bring suit for damages?

(Testimony of Rina Maria Vatuone.)

A. Yes, you did advise me of that.

Q. And did you choose then to bring a suit for damages rather than accept compensation?

A. Yes, I did.

Q. Did you find out that your attorney under your instructions sent a telegram and he apparently——

Mr. Collett: If the Court please, let the witness testify. If he wants to testify, let him take the stand.

Mr. Ryan: I will prove this by Mr. McMahon. I will leave that aside. The complaint was signed by us. I will leave that out.

Q. Did you later on receive notice that the Bureau of Employee's Compensation did, on August 3rd, 1949, make an award of compensation awarding yourself and your daughter \$78.75 a month?

A. Yes, I received that and mailed it——

The Court: Excuse me. What was the date of that? [78]

Mr. Ryan: August 3rd, 1949, two days after the suit was filed.

Q. Is this a copy of the warrant that you received from the Bureau of Employee's Compensation?

A. Yes, it is.

Mr. Ryan: I offer this in evidence, your Honor.

The Court: It may be marked in evidence.

(The document referred to was thereupon received in evidence and marked Libellant's Exhibit No. 6.)

(Testimony of Rina Maria Vatuone.)

Mr. Collett: No objection.

Q. (By Mr. Ryan): Shortly after receiving this award of compensation, did you receive a warrant in the sum \$118.12 that was supposed to cover the period from the time of his death until some time in August? A. Yes, I did.

Q. Did you accept that check of the Government's?

Mr. Collett: If the Court please——

The Court: I assume that the question is directed to the physical acceptance of the check as distinguished from the legal interpretation that may be placed upon it.

Mr. Ryan: Yes, your Honor.

Mr. Collett: I am trying to be patient, to get the story out, but if counsel wants to take the stand and testify, let him do so. Otherwise he should ask the witness the questions and let her testify. Objected to as leading. [79]

The Court: All right.

Q. (By Mr. Ryan): What did you do with that check? A. I sent it back.

Q. You sent it back to the Government at Washington? A. Yes.

Q. Later on did you receive one more check in the sum of \$78.75?

A. I sent both checks back.

Q. Did you ever receive any more checks from the Government other than those two that you sent back? A. Not for compensation, no.

(Testimony of Rina Maria Vatuone.)

Q. Have you ever used any compensation checks from the Government? A. No, I did not.

Q. And you only received those two that you sent back, is that correct? A. Yes, that is right.

Q. I show you a carbon copy of a letter dated August 19th, 1949, and addressed to Mr. William McCauley, Director of the Bureau of Employee's Compensation, and I will ask you if you requested the Government to comply with what I said in that letter? This is just for identification first.

A. Yes, I did.

Q. And that is a true copy of the letter, isn't it?

A. Yes, that is right. [80]

(Discussion between counsel.)

Mr. Ryan: Your Honor, counsel questioned me. The letter is dated August 19th, and in handwriting above it, it states, "Airmailed August 30th." I will have to take the stand to explain that. I offer this letter in evidence.

Mr. Collett: I will object to it at this time on the ground that no proper foundation has been laid.

The Court: Mark it for identification and you can take the stand.

(The document referred to was thereupon marked Libellant's Exhibit No. 7 for identification.)

Q. (By Mr. Ryan): And in answer to that letter did you receive this letter from the Bureau of Employee's Compensation dated September—

(Testimony of Rina Maria Vatuone.)

Mr. Collett: If the Court please——

Mr. Ryan: I withdraw the question.

Mr. Collett: Before we get Mr. Ryan's testimony into the record again, let us follow the procedure here.

Mr. Ryan: I have to take the stand on this because this letter is addressed to me and all the rest of the correspondence is with our office.

The Court: You might ask the general question of the lady whether she authorized you on her behalf to engage in the correspondence.

Q. (By Mr. Ryan): Mrs. Vatuone, can you tell the Court whether [81] you authorized me as your attorney to write to the Government rejecting the compensation checks?

A. Yes, I did authorize you to.

Q. And you knew I was doing that on your behalf?

A. Yes.

Q. And did you approve of that conduct on my part?

A. I did.

Mr. Ryan: That is all, your Honor.

The Court: We will take a short recess.

(Recess.)

Mr. Collett: If the Court please, in order to save some time, I have what is known as the 201 file, the personnel file of the personnel division, San Francisco Port of Embarkation, on the employment of Mr. Vatuone, including the oath of office, and his various employments from the inception of Mr. Vatuone's employment down to the time of his

(Testimony of Rina Maria Vatuone.)

death. I have shown it to counsel and I will offer this in evidence as the employment record, as far as the Government is concerned, of the deceased as an employee of the United States.

The court: So ordered.

(The file referred to was thereupon received in evidence and marked Respondent's Exhibit C.)

Cross-Examination

By Mr. Collett:

Q. Mrs. Vatuone, you stated that it was about week after your husband's death that you had a conversation [82] with Mr. Sutherland?

A. I believe it was a week, yes.

Q. You were informed by the receptionist, was it, at the Marine Hospital, or at Fort Mason? Where was the receptionist?

A. I was called in to the hosiptal, and I don't remember the name exactly. I think it was Mrs. Harris,—

Q. Mrs. Harris?

A. Told me to get in touch with Mr. Sutherland, and in the meantime Mr. Sutherland, I think, was trying to get hold of my home by telephone, and we finally got together. He told me to come to Building 207, Fort Mason, to fill out these papers.

Q. And your best recollection of that date is about a week after your husband's death?

A. Yes, I think it was during the next week. Things were in such a state, I don't exactly re-

(Testimony of Rina Maria Vatuone.)

member the date, but I think it was at that time.

Q. You say that was Building 207 at Fort Mason you went to see Mr. Sutherland?

A. I think that was the address.

Q. And that was the first time that you had an interview with Mr. Sutherland? A. Yes.

Q. That was the first time that you saw the man, is that right? [83]

A. Yes, that is the first time I met Mr. Sutherland.

Q. Could you tell us again now just what Mr. Sutherland said to you in that conversation that you had and what you said to him, to the best of your recollection?

A. I don't remember the details and each question and answer, but the part that seemed important to me and important to this case is if I received the compensation I could still bring suit because the amount of the compensation would then be deducted from the award and I would get the remainder or the balance of the award at the time the suit was adjudged or finished.

Q. Did you have any discussion about that statement after your conversation with Mr. Sutherland with anyone other than Mr. Sutherland?

A. I discussed it with Mr. McMahon, my attorney.

Q. What did you tell Mr. McMahon that Mr. Sutherland had said to you?

A. The same thing that I told you now.

Q. And that is, that if you took the compensa-

(Testimony of Rina Maria Vatuone.)

tion, that if you recovered from the Government by any other means, that whatever payments you might have received would be deducted as against whatever other recovery you made, is that right?

A. That in substance is right. In other words, supposing I had gotten a \$2000 award after suit. If I had received in the interim \$1000, I would then get \$1000, being the balance [84] of my judgment. That is the way that I understood it.

Q. Did Mr. Sutherland say that to you?

A. He did not testify any amounts, no, but in substance that is what it amounted to.

Q. Did Mr. Sutherland say anything about a suit?

A. He said, "You have the privilege of bringing suit, but in the interim you have to live on something, and the compensation that you receive will then be deducted from the award."

Q. Did he say specifically that you had the privilege of bringing suit? A. Yes.

Q. He said that, and that you have to live on something in the meantime? A. Yes.

Q. That was the first conversation that you had with him when he made such a statement?

A. Yes.

Q. Then you proceeded to discuss the matter of filing a claim for compensation?

A. Yes. There was a form that I had to fill in. So he asked me the questions and I filled in whatever form I had for him.

(Testimony of Rina Maria Vatuone.)

(Mr. Collett handed a document to Mr. Ryan.)

Mr. Collett: I am going to offer the whole thing for identification.

Mr. Ryan: Counsel states he is going to offer this in evidence, I have no objection to that portion he showed me. [85]

Mr. Collett: You can object when it comes to the point.

Mr. Ryan: I have no objection to counsel offering the page which she signed, and the one he has showed me, which is her application. I am going to object to the whole file, which I will explain to your Honor later if he offers it.

The Court: There is nothing before this Court. What counsel is going to object to or is not going to object to is wholly immaterial at this point. I want this marked for identification. It may be marked.

Mr. Collett: It is an authenticated copy from the Federal Security Agency of the Federal Security Agency file.

The Court: It may be marked.

(The file referred to was thereupon marked Respondent's Exhibit D for identification.)

Q. (By Mr. Collett): Mrs. Vatuone, I show you a portion of Respondent's Exhibit D for identification. That is CA-5 form entitled "Claim for Compensation on Account of Death." I ask you

(Testimony of Rina Maria Vatuone.)

to identify your signature at the bottom of that form.

A. Yes, that is a photostatic copy of my signature.

Q. That is a photostatic copy of your signature, is it? A. Yes.

Q. That is the form, is it not, that was discussed with you at your first visit with Mr. Sutherland?

A. I don't know whether it was my first or second visit, but it looks like the form. The questions seem to be answered the [86] way I answered them.

Q. Subsequently after your signing the form did Mr. Sutherland obtain a copy of the certificate of marriage and the abstract of marriage record and record at St.—what hospital was it that Paulette was born in? A. St. Francis.

Q. St. Francis Hospital, certifying that she was born on the 17th of April, 1942, and the certified copy of the death certificate of your husband to attach to the document?

A. Yes, I had to obtain those.

Q. Did you obtain them yourself?

A. Some Mr. Sutherland got for me; others I had to secure for myself.

Q. I show you an affidavit relating to representatives of the deceased's beneficiaries, and likewise ask you to identify the photostatic copy of your signature. A. Yes.

Q. Was that document made out by you?

A. Yes, I made this out.

Q. And that was sworn to by you as an affidavit

(Testimony of Rina Maria Vatuone.)

on the 28th of June, 1949, before Anna Pritchard, is that right? A. Yes, that is right.

Mr. Ryan: May I see what you referred to, please?

Mr. Collett: Mrs. Vatuone, were you informed as to the amount to which you were entitled subsequent to the amendment [87] of the compensation act of October, 1949?

Mr. Ryan: I object to that, your Honor, on the ground that it is incompetent, irrelevant and immaterial. Subsequent to the bringing of this law suit, and on October 14th, 1949, the compensation act was amended and the amounts thereof were liberalized, and I object to that on the ground that it is incompetent, irrelevant and immaterial, because prior to that time she made her election to bring the suit rather than to proceed by compensation, and she never did get anything out of the new law. So I make that objection.

Mr. Collett: If the Court please, the compensation act provides—and I am referring now to Public Law 357, Section 303(g)—as follows:

“The amendment made by Section 201 of this act to Section 7 of the Federal Employees Compensation Act making the remedy and the liability under such Act exclusive except as to masters or members of the crew of any vessel shall apply to any case of injury or death occurring prior to the date of the enactment of this——”

(Testimony of Rina Maria Vatuone.)

Mr. Ryan: Just a moment, your Honor, may I interrupt, now, your Honor? I submit this is improper cross-examination and is calling for the conclusion of the witness, as he is asking the witness questions concerning this law. I suppose that at the conclusion of the case that we are going to argue [88] the effect of the law.

The Court: What was the question, counsel?

Mr. Collett: The question I asked was if she was informed as to the amount of compensation to which she is entitled under the award as a result of the enactment of Public Law 357. I did not use the specific designation. I simply referred to the amendment to the compensation act, as of October——

The Court: You can address a question to her as to any conversation she may have had with this gentleman whose name has been referred to concerning any expectation she may have had in the future under any particular law so discussed. Her interpretation, of course, would not help me.

The Court: Did you have any discussion with this gentleman about any future compensation you might receive under any amendment or amendments to the law as it then existed?

A. No, we had nothing said about that.

Mr. Collett: Counsel made an objection, and in order that the Court might be informed he stepped in before I had finished. I am not arguing the law. I am simply addressing myself to the objection that

(Testimony of Rina Maria Vatuone.)

was made, and I think the question is proper and that the provisions of the compensation act itself that any person—I would like to read on further if I may——

The Court: There is no objection?

Mr. Ryan: No.

Mr. Collett (Reading): “That any person who has commenced [89] a civil action or an action in Admiralty with respect to such injury or death prior to such date shall have the right at his election to continue such action notwithstanding any provision of this act to the contrary, or to discontinue such action within six months after such date before final judgment, and file claim for compensation under the Federal Employees Compensation Act as amended within the time limited by Sections 15 to 20 of such act or within one year after the enactment of this act, whichever is later. If any such action is not discontinued and is decided adversely to the claimant on the ground that the remedy and liability under the Federal Employees Compensation Act is exclusive or on jurisdictional grounds or for insufficiency of pleadings, the claimant shall, within the time limited by Sections 15 to 20 of such act, including any extension of such time limitations by any provision of this act, or within one year after final determination of such cause, whichever is later, be entitled to file a claim under such act.”

I think the whole matter of the understanding of the Libellant in this action in regard to the

(Testimony of Rina Maria Vatuone.)

compensation act is a matter before this Court, and the question as to whether or not [90] she is entitled to any recovery, whether she understands the fact that the claim entitled her to a certain award and by act of Congress that award was increased I think is a matter that should be before the Court as to whether she knows it.

Mr. Ryan: Your Honor, she has already answered she had no such conversation with regard to proposed changes in the law.

Mr. Collett: Oh, no, she has not. The Court asked her with regard to Mr. Sutherland.

The Court: You might ask her the questions if she has knowledge concerning the matter.

Q. (By Mr. Collett): Are you informed as to the amendment made by Congress in October of 1949, Public Law 357 as affecting the award which is introduced in evidence as Libellant's Exhibit No. 6?

A. Yes, I am aware of it.

Q. Under that amendment under Public Law 357 is the amount to which you are entitled per month as compensation the award that was made?

Mr. Ryan: I object to that on the ground that that calls for her conclusion, not the best evidence, and on the ground that it is incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Collett: She said she was informed. I am asking her of what she was informed. [91]

Mr. Ryan: Also I object on the ground of hearsay.

(Testimony of Rina Maria Vatuone.)

The Court: Sustained.

Mr. Collett: If the Court please, I think it is an important matter.

The Court: You can indicate the amount according to the schedule whatever it may be and counsel will stipulate to it. What effect is that going to have on my determination of this case? I cannot see the immediate relevancy as to what future expectation she may have with respect to compensation under an amended act. Did you read *Johnson vs. the United States* which came down recently in the advance sheet?

Mr. Collett: Yes, your Honor.

The Court: I happened to read it over the holidays.

Mr. Ryan: I think it is very pertinent to this case.

The Court: It is very edifying. It goes into the question of the election of remedies under the old law.

Mr. Ryan: Yes.

Mr. Collett: A quick blush on this question leads one down false alleys. Loose language is used by all the courts because the matter is not properly thought through.

The Court: Counsel, I am only indicating to you that *Johnson vs. the United States* is an opinion from what presumably is an appellate tribunal. The circuit escapes me.

Mr. Ryan: The Ninth Circuit, Judge Bone.

(Testimony of Rina Maria Vatuone.)

The Court: The Ninth Circuit, Judge Homer T. Bone. [92]

Mr. Ryan: I have it in the Weekly Law Digest.

Mr. Collett: If you are referring to Johnson vs. the United States of America, Herbert L. Johnson, which appears at 1950 AC——

The Court: It just came down, counsel, I can't recall the citation.

Mr. Ryan: It was decided April 7, 1950.

The Court: It had to do with the question of election of remedies, and it reviewed practically all the authorities. There are two Johnson cases in the circuit. There is one Johnson case that came down two or three years ago on which our distinguished Justice Orr wrote the prevailing opinion and it had to do with the doctrine of *res ipso loquitur*, the question of a dropping of a load off a winch. In that case the trial court was reversed. That is one Johnson case. The other has to do with the election of remedies.

Mr. Ryan: Here it is, your Honor. It is United States against Johnson, Volume 4, page 167, of the Weekly Law Digest. It was not Judge Bone; it was Judge Pope, Ninth Circuit, who decided it April 7th, 1950. In that case the Plaintiff was injured when the Navy automobile in which he was being driven by a Navy chief overturned on Guam. He was awarded damages under the Federal Torts Claim Act, and the questions arose——

The Court: That was my case. I tried that case. That is another matter. [93]

(Testimony of Rina Maria Vatuone.)

Mr. Ryan: That is a Johnson case. An employee has a right to sue the United States. In fact your Honor had another case similar to this, Lawson against the United States, in which your Honor awarded \$70,000 to an employee of the United States, and the question also involved there was whether his sole remedy was by compensation or whether he had a right to sue the United States under the same law under which we are suing here, the Public Vessels Act. That is in 1950 American Maritime cases.

Mr. Collett: If the Court please, we could go on again. There is also the Ferris case, the Griggs case, the Jefferson case, which are presently before the United States Supreme Court.

The Court: Counsel, I am not foreclosing you. I am looking forward with a great deal of pleasure to the moment when we launch into these arguments because I know you are well prepared. I have been away from this matter of Admiralty so long I need a little refreshment on the subject. But at the moment I cannot see that any question of this witness concerning the amendment of the act will aid me in solving this problem. If you have a different view, I will be glad to hear you out.

Mr. Collett: I think the Court should be informed as to the full circumstances surrounding a person who purportedly after making a claim for compensation and an award having been [94] made. and the Congress of the United States having increased the amount of that award, and subsequently

(Testimony of Rina Maria Vatuone.)

being prevailed upon by counsel to file a suit against the United States under the expectation that she might get something more, might hit the jackpot or find a pot of gold at the foot of the rainbow—I think it is of interest to the Court and of importance in the determination of the case and in appreciation and understanding of all the matters involved in the action that the information that was made available to claimant, the libellant in this action, should be before the Court.

Mr. Ryan: I say that is no matter of Mr. Collett's. It is a matter of this lady's choice. She chooses to proceed this way, the law gives her the right. She has a right, and I say it is irrelevant to bring that up as an issue in this case.

Mr. Collett: This Court is charged in seamen's cases with the responsibility of considering that the libellant as a seaman is a ward of the Court. The Court has great latitude in looking to the interests of libellants as such. In this particular case it is, of course, the Government's position, following your Honor's decision in the Garson case, which is on all fours and which follows the other cases which I have cited, that the decedent was not a seaman. However, we have an employee of the United States. We have an instance in which the Congress of the United States has seen fit in the first [95] instance to have enacted a compensation act and to have amended that compensation act. In the face of a great amount of speculation as to whether or not that compensation act was exclusive as to

(Testimony of Rina Maria Vatuone.)

such an employee as we have here—that is not getting into the member of the crew question, which is purportedly left in status quo by the express provision of the act—the Congress of the United States has made that act exclusive and retroactively exclusive and has allowed, and we perhaps might say, in its infinite wisdom and its consideration for all persons and their right, that the provision that I just read to your Honor, that in the event a person may have filed a suit prior to the time the act went into effect, that they continue prosecution of that suit. Purportedly if that prosecution is continued to the point where they received nothing on the merits, then they have lost their compensation as well as their expectation of recovery. Now, this compensation matter is a very important question for the Court to consider in the interest of the libellant that she understands or whoever it may be understands that when they have proceeded with the action, that they precluded themselves from receiving compensation. But again Congress in its wisdom, and having in mind apparently that there is a good deal of doubt about the exclusiveness of the compensation act as to such an employee as we have here, the argument is very strong. Granted in the seamen's cases, because of the provision that is in there, the matter has not reached a high enough Court to have it clarified. It may be [96] clarified by the time Jefferson, Ferris or Grigg cases have found their way through the Supreme Court. Perhaps the Supreme Court will clarify the

(Testimony of Rina Maria Vatuone.)

Brooks case and its status, but we have here an individual who is deceased, who was not a member of a crew, and is therefore not entitled to the exclusionary provision in the compensation act that allows a seaman to remain in his status quo. But the act now is exclusive as to every person who suffers an injury or to any heir who might endeavor to bring such an action as result of the death.

Mr. Ryan: I wonder if I might interrupt a moment? I see counsel is going into an extended discussion of the law. I have Mr. Powers here. He inquired of the electrician. It is almost twelve o'clock. I wonder if I can withdraw the lady so I can put him on?

Mr. Collett: That is very nice, but it is not going to take me long.

Mr. Ryan: Can't we argue this at the end of the case?

The Court: Let us hear it.

Mr. Collett: If any such action is not discontinued and is decided adversely to the claimant on the ground the remedy or liability under the Federal Employees Compensation Act is exclusive, Congress definitely had in mind that the Court can, could, might determine that that Federal Employees Compensation Act is exclusive, preserved to the claimant the right still to go on and obtain compensation. The only exception, of course, [97] where they would be precluded from any recovery is where it is determined on the merits that the Government was not liable in such an action under

(Testimony of Rina Maria Vatuone.)

the Public Vessels Act or the suits in Admiralty Act.

I say to the Court the whole matter surrounding the understanding of a person in such a position as this libellant is with regard to claims that are made and actions that are filed——

The Court: Is it your position that the amendment to the act works retroactively to the extent that it served to abate an action theretofore brought of this nature?

Mr. Collett: The express wording, if the Court please, if I understand the Court's question, to go back to the quotation "Provided, however—any person who has commenced a civil action or a suit in Admiralty with respect to such injury or death prior to such date shall have the right at his election to continue such action notwithstanding any provision of this act to the contrary, or to discontinue such action within six months after such date before final judgment and file claim."

The Court: Do you think, counsel, when you speak of Congress in its infinite wisdom—of course, I cannot subscribe to its infinite wisdom; I may subscribe to its wisdom—but when you say that Congress in its infinite wisdom had occasion to pass this legislation and allow for election, don't you think that Congress had in mind perhaps the wind-fall you speak of, the one that may be garnered out of the act itself of higher [98] benefits that might follow as distinguished from the ordinary lawsuit and the benefits that might follow? This lady is

(Testimony of Rina Maria Vatuone.)

in court. She seems content in this court. Counsel brought her here. She is apparently willing to rest her claim in this forum and under the circumstances I cannot see, one, how the action is abated; second, how she can be compelled to seek, as a result of subsequent legislation to declare an election otherwise than she has sought to maintain. That is my view on the matter. The law merely says she has an election within a period of six months to resort to the added benefits as distinguished from the rather infinitesimal amounts provided in the old act. Congress in its benign and infinitesimal wisdom saw fit to add to the benefits, which were so patently small and insignificant as to shock the conscience, I suppose, in many instances, having in mind the deflated value of the dollar. That is about the construction I place upon it. I am not going into any metaphysical distinctions about it. This is my view. Now you can place the man on the stand.

DAN G. POWERS

was called as a witness on behalf of the Libellant, sworn.

The Clerk: Mr. Powers, will you state your full name to the Court?

A. Dan G. Powers.

Direct Examination

By Mr. Ryan:

Q. Mr. Powers, after the earlier session [99] this morning did you make inquiry of the Govern-

(Testimony of Dan G. Powers.)

ment authorities at Fort Mason as to the present whereabouts of Henry W. Chandler?

A. I did.

Q. What did you find out as to his present whereabouts?

A. They tell me he is attached as assistant electrician to the U.S.S. Brewster, and they said the U.S.S. Brewster sailed from a San Francisco port on June 2nd west toward the Islands. They definitely could not say where the ship was at this time and could not say when it would return.

Q. When you say "the Islands," are you referring to the Philippine Islands and the Hawaiian Islands? A. And Japan.

Mr. Ryan: That is all.

Cross-Examination

By Mr. Collett:

Q. Whom did you contact?

A. There was a series. I first called the home number. There was no answer. Then I called the Army, West 1-6111. They referred me to Prospect 6-2200, which is Fort Mason. At Fort Mason I told them my problem. They said the Aultman was sailing at 11 o'clock today, and that was ten minutes to eleven when I was on the phone. They tried to contact the Aultman. No answer. The girl said, "Try Yukon 2-3700, extension 15," which is the ship information. And from the ship's information at that number, a lady, after some time, came back with the information I just stated. [100]

(Testimony of Dan G. Powers.)

Q. Did you know that you were talking to the Military Sea Transport Service?

A. I got the information it was ship's information. That is the note I put down. I know it did say this, that they were not allowed to give it out except in writing. I told them the problem we were in.

Q. Did you inquire as to the assignment of Mr. Chandler?

A. Only that he sailed as assistant electrician on board the U.S.S. Brewster.

Q. And the Brewster sailed when?

A. June 2nd.

The Court: June 2nd, 1950?

A. Yes.

Mr. Collett: That is all.

Mr. Ryan: That is all at this time, Your Honor. I renew my offer in evidence of the deposition of Henry W. Chandler.

The Court: You may read the same and I will rule on the objections as you read it. We might take the noon recess, if agreeable. We will continue this case until two o'clock. [101]

Tuesday, June 6, 1950—2:00 P.M.

Mr. Ryan: May it please Your Honor, I would like to read into evidence certain excerpts of this deposition. I presume Your Honor has the original.

The Court: Yes, I have the original.

Mr. Ryan: The first part I want to read, Your Honor are the preliminaries beginning with page 4, line 1, to page 5, line 14, as follows:

"Q. What is your name?

"A. Henry W. Chandler.

"Q. Where do you live?

"A. 3961-A-24th Street.

"Q. San Francisco? A. That is right.

"Q. What is your 'phone number?

"A. Valencia 4-2068.

"Q. What is your age, if I might ask?

"A. 43.

"Q. What is your business or occupation?

"A. Army Transport electrician.

"Q. Now, you are an electrician connected with the United States Army Transport Service, is that correct? A. Yes.

"Q. Are you employed as an electrician on any vessel?

"A. I am now assistant electrician.

"Q. On what vessel?

"A. 'General D. E. Aultman.'

"Q. That is the United States Army Transport 'General D. E. Aultman'?

"A. That is right.

"Q. How long have you been employed as an assistant electrician on board that vessel?

"A. Since September 23rd of last year, almost a year. [102]

"Q. Now, as I understand it, that vessel just recently came into San Francisco, is that correct? A. Yes.

"Q. When did it arrive here?

"A. Tuesday.

"Q. That would be September 6th?

“A. That is correct, in the morning.

“Q. You came in from a voyage?

“A. Yes, from San Francisco to Yokohama to Korea and back to Yokohama.

“Q. Pardon me?

“A. Yes, from San Francisco to Yokohama to Korea and back to Yokohama.

“Q. When is that vessel going to leave San Francisco on its next voyage?

“A. The 16th of September.

“Q. Will it likewise go to Japan and Korea?

“A. As far as I know. It has not been definitely decided. I think we will go to Yokohama and return.

“Q. How long a trip will that be?

“A. Around thirty days.

“Q. As I understand it, that vessel after each trip stays in San Francisco or vicinity not to exceed ten days and then goes on another trip, which may last from thirty days to six weeks, is that correct? A. Yes.”

Page 14, line 1 to line 13 as follows:

“Q. When a lifeboat drill is in progress, is it one of your duties to be stationed at that control panel?

“A. When the boats are lowered.

“Q. What is that for?

“A. In case of emergency, [103] if the limit switch does not operate.

“Q. Had you had accidents before?

“A. Yes.

“Q. Men being crushed? A. Yes.

“Q. In other words, you were stationed there so, in case any of the switches were not operating properly, you could immediately turn off the power, is that right?

“A. Yes.

“Q. During the entire progress of this boat drill you were there so you could perform that function? A. Yes.

“Q. And you were there, when this accident happened? A. Yes.”

Mr. Collett: I object, if the Court please, to any matter pertaining to any previous accident.

Mr. Ryan: Your Honor, I am not offering that for the purpose of showing how this accident could have happened, but only to show the necessity of the man being at the panel, and that is the only purpose.

The Court: The objection is overruled.

Mr. Collett: If the Court please, the question as such is directed to any previous accidents. There is no showing as to what accidents. It is wholly immaterial, irrelevant and incompetent as to this particular case and I do not think it is properly admissible.

Mr. Ryan: As I said, Your Honor, it is just to show the [104] purpose of his being where he was.

The Court: The objection is overruled. I am only interested in the fact that he was at a station as a result of the demands of his employment.

Mr. Ryan: That is right, Your Honor.

“Q. In other words, you were stationed there so, in case any of the switches were not operating properly, you could immediately turn off the power, is that right?”

Then I offer to read in evidence, page 10, lines 5 to 8 as follows:

“Q. At the time you noticed Vatuone lying unconscious on the deck was the knife switch on or off A. It was off.

“Q. Had you turned it off? A. Yes.

“Q. Immediately prior to that time it was on? A. Yes.”

Mr. Collett: If the Court please, I am going to move that that entire statement be stricken. It is a statement out of context. On the page previous the question was:

“Q. Now, at the time of the accident was the knife switch in the control panel, which would actuate the motor of number five winch, on or off? A. I don't know.”

The Court: I would suggest that you read that in.

Mr. Ryan: Your Honor, I thought counsel would take up what he wanted. I wish I could read the whole thing.

Mr. Collett: If the Court please, I want to renew my [105] objection to the entire deposition on the ground that it is inadmissible, but if the Court is going to overrule the objection, I would ask that the entire deposition be put in.

The Court: The objection is overruled. We will consider the whole deposition.

Mr. Ryan: Yes.

The Court: The deposition may be considered as read in evidence.

Mr. Ryan: The whole deposition is in evidence.

The Court: Yes, save and except that portion thereof which I struck with respect to prior accidents, and in that regard I state for the record that the reference to prior accidents is admissible only with respect the nature and gravity of employment and the demands if any that were then existent that the man remain at the post.

(The deposition referred to thereupon was received in evidence and marked libellant's Exhibit 8.)

LIBELLANT'S EXHIBIT No. 8

In the District Court of the United States, for the
Northern District of California, Southern
Division

No. 25476—R.

RINA MARIA VATUONE, as Administratrix of
the Estate of PAUL D. VATUONE. Deceased,
Libellant,

vs.

UNITED STATES OF AMERICA,
Respondent.

DEPOSITION OF HENRY W. CHANDLER

Thursday, September 8th, 1949

Be It Remembered that, pursuant to Notice of Taking Deposition and Subpoena, and on Thursday, September 8th, 1949, at the hour of 2:15 o'clock

Libellant's Exhibit No. 8—(Continued)

(Deposition of Henry W. Chandler.)

p.m., at the offices of Messrs. Ryan & Ryan, 800 Phelan Building, 760 Market Street, San Francisco, California, before me, John M. Hally, a Notary Public in and for the City and County of San Francisco, State of California, personally appeared Henry W. Chandler, a material witness in the above-entitled action, who, being by me first duly sworn to testify to the truth, the whole truth and nothing but the truth, then and there testified as is hereinafter set forth.

Thomas C. Ryan, Esq., representing Messrs. Ryan & Ryan, and Robert McMahon, Esq. appeared as counsel for libellant.

Charles E. Collett, Esq., representing Hon. Frank J. Hennessy, United States Attorney, appeared as counsel for respondent.

Mr. Ryan: This deposition is being taken pursuant to Chapter 5 of the Rules of Civil Procedure for the District Courts of the United States.

Mr. Collett: Before you proceed any further, I object to the taking of the deposition on the ground the Rules of Civil Procedure do not apply. This is an Admiralty matter and Section 639 of Title 28 of the United States Code provides for the taking of depositions *de bene esse*.

Mr. Ryan: This deposition is taken pursuant to Notice of Taking Deposition, which has heretofore been served on the United States Attorney and upon a subpoena issued out of the United States

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(Deposition of Henry W. Chandler.)

District Court, which was heretofore served on the witness, Henry W. Chandler.

Well, all right, counsel has called to my attention Section 639 of Title 28 of the United States Code concerning the taking of depositions *de bene esse*. I submit the provisions of that Section have been followed. Reasonable notice was given to the United States Attorney that the deposition was being taken before a Notary Public, as provided for in the section. This witness is about to go on a voyage to sea.

Mr. Collett: Are you through now?

Mr. Ryan: Yes.

Mr. Collett: Well, I am objecting to the taking of the deposition at this time on the ground it is premature and on the further ground the notice does not specify any of the conditions of Section 639 of Title 28 of the United States Code. According to the notice, the witness is a resident of the City and County of San Francisco and there has been no showing he will not be here at the time of the trial.

Mr. Ryan: You have your objections in.

Mr. Collett: I am noting an objection in this case that it is pretty premature to take a deposition. At this time I have nothing on the case.

Mr. Ryan: I see what you mean.

Mr. Collett: I make the further objection that reasonable notice has not been given for the taking of the deposition.

Mr. Ryan: The notice was served on the United States Attorney on September 6th, 1949, in the

Libellant's Exhibit No. 8—(Continued)

(Deposition of Henry W. Chandler.)

morning that the deposition was being taken at 2:00 o'clock p.m. today.

Mr. Charles E. Collett, Assistant United States Attorney, is present.

Another thing I want to state for the record is that the deposition of an adverse or unwilling witness is being taken, as provided by law, and the plaintiff reserves the right to cross-examine and, if necessary, impeach him by other witnesses.

Mr. Collett: I object to the statement of counsel. The Admiralty Rules provide for the taking of depositions. They provide for methods of discovery. Any statement of counsel is objected to.

Mr. Ryan: Now, we can go ahead.

Mr. Collett: I appear on behalf of the United States. I am objecting to any further proceedings in the taking of this deposition and objecting to all questions that may be directed by counsel to the witness on the grounds I have previously stated and now state.

Mr. Ryan: All right, counsel, you have your objections in. They may be decided later on by the Court.

Q. What is your name?

A. Henry W. Chandler.

Q. Where do you live?

A. 3961-A 24th Street.

Q. San Francisco?

A. That is right.

Q. What is your 'phone number?

A. Valencia 4-2068.

Libellant's Exhibit No. 8—(Continued)

(Deposition of Henry W. Chandler.)

Q. What is your age, if I might ask?

A. 43.

Q. What is your business or occupation?

A. Army Transport electrician.

Q. Now, you are an electrician connected with the United States Army Transport Service, is that correct?

A. Yes.

Q. Are you employed as an electrician on any vessel?

A. I am now assistant electrician.

Q. On what vessel?

A. "General D. E. Aultman."

Q. That is the United States Army Transport "General D. E. Aultman"? A. That is right.

Q. How long have you been employed as an assistant electrician on board that vessel?

A. Since September 23rd of last year, almost a year.

Q. Now, as I understand it, that vessel just recently came into San Francisco, is that correct?

A. Yes.

Q. When did it arrive here? A. Tuesday.

Q. That would be September 6th?

A. That is correct, in the morning.

Q. You came in from a voyage?

A. Yes, from San Francisco to Yokohama to Korea and back to Yokohama.

Q. Pardon me?

A. Yes, from San Francisco to Yokohama to Korea and back to Yokohama.

Libellant's Exhibit No. 8—(Continued)
(Deposition of Henry W. Chandler.)

Q. When is that vessel going to leave San Francisco on its next voyage?

A. The 16th of September.

Q. Will it likewise go to Japan and Korea?

A. As far as I know. It has not been definitely decided. I think we will go to Yokohama and return.

Q. How long a trip will that be?

A. Around thirty days.

Q. As I understand it, that vessel after each trip stays in San Francisco or vicinity not to exceed ten days and then goes on another trip, which may last from thirty days to six weeks, is that correct?

A. Yes.

Q. I call your attention to June 15th, 1949. That was the date of this accident to Paul D. Vatuone?

A. Yes.

Q. Where was the "General D. E. Aultman" at the time of this accident?

A. As I remember, it was at the Oakland Army Base or Fort Mason.

Q. Wasn't it at the Oakland Army Base?

A. I don't know.

Q. It was tied up at either the Oakland Army Base dock or Fort Mason?

A. We left on the 17th. Was that the 16th?

Q. June 15th.

A. I think it was at Fort Mason.

Q. I think you are mistaken. It was in Oakland.

A. Was it?

Libellant's Exhibit No. 8—(Continued)
(Deposition of Henry W. Chandler.)

Q. Yes.

A. I know we went over a couple of days early. We usually stay in Oakland until a couple of days before we sail.

Q. Now, where did this accident take place on the vessel?

A. On the starboard side, by number five lifeboat.

Q. Now, was the starboard side alongside the dock? A. No, it was the seaward side.

Q. What deck was this on?

A. The boat deck.

Q. How many lifeboats are there on the starboard side of the boat deck?

A. Let's see now—one, three, five, seven, nine and eleven—I think in five, seven and nine cradles there were two each, one under the other.

Q. In other words, there were six lifeboats on the starboard side? A. That is right.

Q. What was in progress on that deck at the time of the accident?

A. Fire and boat drill.

Q. And in the fire and boat drill did the members of the crew move the lifeboats from their cradles in the davits?

A. Well, after the fire drill is when they let the boats over the side.

Q. Yes.

A. After the fire drill, the boat drill commenced.

Libellant's Exhibit No. 8—(Continued)
(Deposition of Henry W. Chandler.)

Q. At the time of this accident was the boat drill in progress? A. Yes.

Q. How far are they lowered?

A. To the water.

Q. You mentioned lifeboats one to eleven, one would be forward and eleven would be aft?

A. Yes.

Q. Number five is approximately amidship?

A. Yes.

Q. Now, was number five lifeboat being used in connection with the boat drill?

A. It was not used.

Q. Pardon me? A. It was not used.

Q. At the time of this accident where was number five lifeboat? A. In the cradle.

Q. In the cradle of the davits?

A. That is right.

Q. Now, was any work in progress on number five lifeboat or its tackles?

A. I don't know for sure. I think the riggers and machinists had the cable pulled out on the deck on the starboard side.

Q. One cable or two cables?

A. I think it was one long cable, which was around the drum.

Q. How long was that cable, approximately?

A. About 40 to 50 feet, somethink like that.

Q. I see. You say then that cable was wrapped around the drum of the winch?

A. Some of it was.

Libellant's Exhibit No. 8—(Continued)
(Deposition of Henry W. Chandler.)

Q. Is that the winch that was supposed to operate number five lifeboat? A. That is right.

Q. And where is that winch located with relation to the davits of number five lifeboat?

A. It is on the rail.

Q. You mean the davits are on the rail?

A. The motor is on top and the drum is underneath—they are against the rail.

Q. They were at the rail near number five lifeboat? A. That is right.

Q. Now, at the time of this accident did you notice that the riggers were operating number five winch manually, that is, by moving the handle, is that what you call it? A. Crank.

Q. They were moving the crank by hand, is that right?

A. I didn't notice they were moving the crank. My business is when the lifeboats are lowered down to the water, when they come back, I see that the limit switches are working.

Q. Maybe I better go into that. Has each of the six lifeboats a winch and motor close to it, to operate it? A. Approximately close to it.

Q. There is not one motor that operates them, each one has an individual winch and motor?

A. That is right.

Q. What switches could operate the motor of the number five lifeboat winch? Do you see what I mean?

Libellant's Exhibit No. 8—(Continued)
(Deposition of Henry W. Chandler.)

A. There are one, two, three switches. Only one switch operates the lifeboat, the rail switch.

Q. Which one? A. The rail switch.

Q. Where does the electricity start from?

A. From the engine room.

Q. What switches are in the engine room?

A. It is a breaker switch.

Q. A breaker switch? A. Yes.

Q. Now, does that breaker switch operate all the motors for the lifeboats?

A. On the starboard side only.

Q. The breaker switch in the engine room could operate any of the lifeboat motors?

A. On the starboard side.

Q. And from the breaker switch where does the electricity go? A. To the control panel.

Q. Where is that located?

A. On the starboard side, around midship.

Q. How far is the control panel from the number five motor? A. About 30 feet, maybe.

Q. And it is on the same deck? A. Yes.

Q. A man standing at the control panel, if looking, can see people working on number five motor?

A. That is right.

Q. Now, in the control panel is there one or more than one switch? A. Just one switch.

Q. One switch? A. Yes.

Q. How big is that control panel?

A. Number five has a small control panel.

Q. That is the one I am talking about.

Libellant's Exhibit No. 8—(Continued)
(Deposition of Henry W. Chandler.)

A. Three by three.

Q. Three feet by three feet? A. Yes.

Q. Now, at the time of this accident was the breaker switch on in the engine room?

A. It was at that time.

Q. In the control panel could you have the electricity on for five boats on the starboard side and leave off one, number five? A. Yes.

Q. How do you do that?

A. Pull a knife switch, it has two blades.

Q. Now, at the time of this accident was the knife switch in the control panel, which would actuate the motor of number five winch, on or off?

A. I don't know.

Q. You don't know?

A. I don't know when the accident happened.

Q. You saw Vatuone lying unconscious on the deck, didn't you? A. Yes.

Q. At the time you noticed Vatuone lying unconscious on the deck was the knife switch on or off? A. It was off.

Q. Had you turned it off? A. Yes.

Q. Immediately prior to that time it was on?

A. Yes.

Q. When you saw Vatuone lying on the deck, you pulled the knife switch?

A. When I told the fellows it wouldn't work with the boat in the cradle, the limit switch would not work, then I pulled the knife switch on the control panel.

Libellant's Exhibit No. 8—(Continued)
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Q. You put it on? A. I took it off.

Q. Let me go back to the switches. In addition to the breaker switch in the engine room and the knife switch, what other switches would actuate the number five motor?

A. Just the rail switch.

Q. Where is the rail switch located?

A. On the rail.

Q. On the rail close to the davits of number five lifeboat?

A. It is right where the motor and drum are.

Q. How far from the rail switch is the crank of number five winch, when in position?

A. About three feet.

Q. Now, in addition to those three switches you have mentioned is there a fourth switch that has some bearing on the operation of number five lifeboat?

A. In the engine room, then you have the limit switch.

Q. Where is the limit switch?

A. Up on top of the cradle, it cuts the boat off.

Q. That switch is so high above the deck, a man standing on the deck can't reach it?

A. That is right.

Q. What is the function of the limit switch?

A. It stops the boat, when it hits the top of the cradle.

Q. Assuming a person had number five lifeboat

Libellant's Exhibit No. 8—(Continued)

(Deposition of Henry W. Chandler.)

in the water and wanted to lift it to the cradle, would you first put the rail switch on?

A. That is right.

Q. The boat would automatically go up to the cradle and the limit switch would shut off the motor?

A. That is right.

Q. That is the function of the limit switch?

A. Yes.

Q. This accident happened at 10:30 in the morning of June 15th. Prior to 10:30 in the morning, before the accident, did you see any riggers manually working number five winch?

A. I think I saw a lot of crew members around. All the crew members are on each boat. I think they were working.

Q. These riggers were not crew members?

A. That is right.

Q. How many were working on number five winch?

A. I don't know.

Q. Did you know any of them?

A. No.

Q. Did you know who their foreman was?

A. No.

Q. Prior to this accident did you have any conversation with any of the riggers in regard to turning the motor on for number five winch?

A. That is right.

Q. With which one of the crew members was that?

A. It was not one of the crew members.

Libellant's Exhibit No. 8—(Continued)
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Q. Pardon me—I mean riggers. Do you know his name?

A. I don't know his name. The rigger told me to put the switch on or the juice on.

Q. You don't know the name of that rigger?

A. No.

Q. Did you know Paul Vatuone? A. No.

Q. Was he the one or someone else?

A. I did not think it was he. I think his name must be in the statement. The skipper took the same thing you are getting here.

Q. Who took the statement?

A. The Coast Guard or the skipper.

Q. Who was the skipper? A. Williams.

Q. Was he the captain? A. Yes.

Q. Do you know his first name? A. No.

Q. He was the master of the vessel?

A. Oh, no, pardon me—Frez, he was the skipper.

Q. Frez? A. Yes.

Q. What is his first name? A. Otto.

Q. Who is the Williams you mentioned?

A. He is the new skipper. He just came on this trip.

Q. He had nothing to do with it?

A. That is right.

Q. You say one of the riggers, not Vatuone, asked the skipper if the juice could be turned on?

A. He asked me.

Q. He asked you if you could turn the juice on to operate number five winch? A. Yes.

Libellant's Exhibit No. 8—(Continued)

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Q. That was what wound up the cable on the deck? A. Yes.

Q. What did you tell him?

A. That the rail switch wouldn't work.

Q. In other words, when the boat is in the cradle, the rail switch will not work?

A. That is right.

Q. How long before the accident was this conversation, about?

A. It must have been five or ten minutes.

Q. Where were you, when the rigger asked you that? A. I was at the control panel.

Q. You were at the control panel?

A. I didn't stay there all the time. We have a cargo resister room and the exhaust motor taking the heat from the resister room was shorted out.

Q. That motor was shorted out? A. Yes.

Q. At the time of this accident?

A. Before.

Q. Why did you mention that?

A. I had something on my mind beside the boat drill. I had two portable fans in the resister room—my mind was occupied between the boat drill and the cargo resister room.

Q. Where was the cargo resister room located?

A. About ten to fifteen feet away.

Q. You had your attention centered on that, as well as the control panel? A. That is right.

Q. I might as well ask you this now—You were the electrician, who had charge of all motors and

Libellant's Exhibit No. 8—(Continued)

(Deposition of Henry W. Chandler.)

switches and panels on the starboard side at the time? A. Yes.

Q. Who was the chief electrician?

A. Ive Matthews.

Q. Where was Matthews?

A. He was at number one cargo winch.

Q. When a lifeboat drill is in progress, is it one of your duties to be stationed at that control panel?

A. When the boats are lowered.

Q. What is that for?

A. In case of emergency, if the limit switch does not operate.

Q. Had you had accidents before?

A. Yes.

Q. Men being crushed? A. Yes.

Q. In other words, you were stationed there so, in case any of the switches were not operating properly, you could immediately turn off the power, is that right? A. Yes.

Q. During the entire progress of this boat drill you were there so you could perform that function?

A. Yes.

Q. And you were there, when this accident happened? A. Yes.

Q. Five or ten minutes before the accident one of the riggers asked you if you could turn on the juice to operate the motor of number five winch and you told you couldn't do it?

A. That is right. I explained to him why it

Libellant's Exhibit No. 8—(Continued)

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wouldn't work. I went over and tried the rail switch.

Q. You left the control panel and went over to number five lifeboat?

A. I told him the boat was cradled. I tested the limit switch. It was all right.

Q. How did you do that, climb a ladder?

A. There are seats along the lifeboats, where they sit. They have a ladder there.

Q. You tested the limit switch? A. Yes.

Q. What did you find? A. It was all right.

Q. It was off? A. Yes.

Q. Then you tested the rail switch?

A. Yes.

Q. Did you find it off or on?

A. You have to hold it on with a spring. You have to keep your hand on it.

Q. In order to operate the rail switch, what do you do? A. Turn it to the left.

Q. You have to hold your hand on it, while it is being operated? A. Yes.

Q. You found the rail switch was off?

A. Yes.

Q. It was not actuating any juice into the motor?

A. That is right.

Q. How about the knife switch and the control panel, was that on for number five winch?

A. Yes.

Q. In other words, electricity was running through that? A. Yes.

Libellant's Exhibit No. 8—(Continued)
(Deposition of Henry W. Chandler.)

Q. Let me ask you this, if the rail switch was off, that is, no juice was going through it and if the limit switch was negative or silent, no juice was going through it and if a person standing at the control panel would press that knife switch, would that enable number five motor to operate?

A. No.

Q. You think not? A. Yes.

Q. You know at the time of this accident, the motor of number five winch was operating, do you not? A. I didn't see the motor operating.

Q. Do you know what caused this man to be thrown on the deck and knocked unconscious?

A. No.

Q. You didn't see the accident?

A. No, I didn't.

Q. Did you know that someone went over and turned off the motor on number five winch?

A. How could he turn it off. I didn't know it was on.

Q. You don't know of your own knowledge how this man was hurt, do you?

A. No. Here is my opinion——

Mr. Collett: Never mind your opinion.

A. We had a talk.

Q. (By Mr. Ryan): After you went over and tested the rail switch and the limit switch, did you walk back to your post at the control panel?

A. I walked back immediately and turned the knife switch off.

Libellant's Exhibit No. 8—(Continued)
(Deposition of Henry W. Chandler.)

Q. You put your fingers in, did you?

A. No, it has a handle.

Q. You reached with one hand and pulled the handle of the knife switch? A. That is right.

Q. Immediately after you pulled the handle of the knife switch you saw Vatuone unconscious on the deck? A. No.

Q. Within a very few seconds after you saw him? A. No.

Q. How long after did you see Vatuone lying on the deck?

A. I don't know just when it was. I think, when I pulled the knife switch, number seven boat was coming up in the cradle. I have to go to the rail to see what boats are coming up.

Q. You say you went back to the control panel, after you tested the rail and limit switches for number five winch? A. Yes.

Q. After you went back, you reached in and pulled the knife switch of number five motor?

A. Yes.

Q. How long after you pulled the knife switch did you see Vatuone lying on the deck?

A. I don't know.

Q. Was it a second or two?

A. I don't know.

Q. Approximately.

A. I don't know what happened. After the guy got killed, maybe I went to where the fans were. Maybe five or ten minutes.

Libellant's Exhibit No. 8—(Continued)
(Deposition of Henry W. Chandler.)

Q. The accident happened five or ten minutes after what?

A. After I pulled the knife switch.

Q. Pardon me, I thought you told me before the conversation, when the rigger asked you to turn on the electricity, occurred four or five minutes before the accident?

A. I don't know when the accident occurred. When I came back from seeing number seven boat come up, I saw the man lying on the deck. It might have been two or five minutes.

Q. Between two and five minutes after you pulled the knife switch, did you see him lying on the deck? A. I don't know.

Q.. Somewhere around there?

A. It might have been two, five or ten minutes.

Q. Since the accident you have been ordered to turn off the switches altogether, when the light boats are up in the davits?

A. That is right and pull the fuses too.

Q. So you can't have an accident like this?

A. Yes. I never saw the motor running.

Q. What did you do when you saw Vatuone lying on the deck? A. What could I do?

Q. I am not criticising you. I said, what did you do?

A. I waited until the fire and boat drill was over.

Q. Did you go up to Vatuone?

A. No, one of the medical sergeants was there.

Libellant's Exhibit No. 8—(Continued)

(Deposition of Henry W. Chandler.)

Q. Did the fire and boat drill continue?

A. Yes.

Q. Was there any interruption? A. No.

Q. Did you go over to the motor of number five winch?

A. After the accident I looked at the rail switch to see if it was working and if the control panel was working. The Chief Engineer told me to do that.

Q. If this motor of number five winch began to operate, you don't know of your own knowledge what caused it to operate, is that right?

A. Yes. No one else seemed to know either.

Q. Did you tell Mr. Powers on July 25th less than a minute elapsed between the time you pulled the limit switch and the time you saw Vatuone lying on the deck?

A. I told him it takes less than a minute to go back to the control panel from the rail switch.

Q. Do you know Jack Harris, the foreman of the riggers on the ship that day? A. No.

Q. You don't know if he was the man, who asked you to turn on the juice? A. No.

Q. Was there a machinist working by the name of Al Wood at the time of this accident?

A. I don't know.

Q. Do you know a fellow by the name of Sinclair?

A. No, I don't know any of the riggers or machinists.

Libellant's Exhibit No. 8—(Continued)
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Q. Mr. Chandler, these were all Westinghouse motors, weren't they? A. That is right.

Q. You tested them right after the accident and found all switches and motors to be operating properly, is that correct?

A. As far as I know, they were.

Q. Were you present the next day, when Westinghouse representatives came on board and tested the motors? A. I was aboard.

Q. As far as your observation was concerned, could you say they found all switches were operating properly? A. Yes.

Q. Now, all the switches and motors are under the control of the ship's electricians, that is the Chief Electrician and yourself, as Assistant?

A. Yes.

Q. That is your job to see that these switches and motors work properly, isn't it? A. Yes.

Mr. Ryan: I believe that is all, Mr. Chandler.

Mr. Collett: I have no questions.

Mr. Ryan: Subject to your objections and if the Court holds this deposition may be used at the time of the trial, may it be used without the necessity of the witness signing it? I am trying to avoid bringing him back.

Mr. Collett: He will be back in a month.

Mr. Ryan: Very well.

/s/ HENRY W. CHANDLER.

Libellant's Exhibit No. 8—(Continued)

State of California,

City and County of San Francisco—ss.

I, John M. Hally, a Notary Public in and for the City and County of San Francisco, State of California, hereby certify that the witness, Henry W. Chandler, named in the foregoing deposition, was by me first duly sworn to testify to the truth, the whole truth and nothing but the truth in the above-entitled action; that the said deposition was taken on the 8th day of September, 1949, at the hour of 2:15 o'clock p.m., at the offices of Messrs. Ryan & Ryan, 800 Phelan Building, 760 Market Street, San Francisco, California; that it was taken down in shorthand by Neil H. Crawford, a competent shorthand reporter and a disinterested person, and by him transcribed into longhand typewriting; that after being so transcribed the same was read over by or to said witness, who, after correcting the same in such particulars, as he desired, subscribed the same in my presence.

And I hereby further certify that I am not of counsel nor in any way interested in the outcome of said action.

It Witness Whereof, I have hereunto set my hand and affixed my notarial seal this 12th day of September, 1949.

[Seal] /s/ JOHN M. HALLY,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed September 16, 1949.

Mr. Ryan: May it please Your Honor, there are a couple of more excerpts I want to call to your Honor's attention which I consider of importance. I want to call Your Honor's attention to page 9, lines 5 to 9, as follows:

"Q. How far is the control panel from the number five motor?

"A. About 30 feet, maybe.

"Q. And it is on the same deck?

"A. yes. [106]

"Q. A man standing at the control panel, if looking, can see people working on number five motor? A. That is right."

Then, your Honor, I call your attention to page 13, lines 22 to 24 as follows; I think I have this wrong. Oh, yes, I have it wrong. It is page 13, lines 22 to 24 as follows:

"Q. I might as well ask you this now: You were the electrician who had charge of all motors and switches and panels on the star-board side at the time? A. Yes."

On the same subject matter, page 19, lines 10 to 14:

"Q. Now, all the switches and motors are under the control of the ship's electricians, that is the Chief Electrician and yourself, as assistant? A. Yes.

"Q. That is your job to see that these switches and motors work properly, isn't it?

"A. Yes."

Your Honor, in view of the fact that the whole

thing is in evidence, those are the only parts I wish to call to your attention at this time.

The Court: The deposition appears to be signed by Henry W. Chandler.

Mr. Ryan: Yes, your Honor, and sworn to before a Notary.

I would like to put Mr. McMahon on. [107]

Mr. Collett: I have not finished with Mrs. Vatuone.

Mr. Ryan: I beg your pardon.

The Court: Mr. Mitchell, this may be marked and considered read.

RINA MARIA VATUONE

The Clerk: The witness on the stand is Rina Maria Vatuone, heretofore sworn.

Mr. Collett: At this time, if the Court please, I will offer in evidence the authentic copy of the record of the Bureau of Employee's Compensation, Federal Security Agency, relating to the case of Paul Vatuone, deceased, Transportation Corps, Department of the Army, San Francisco Port of Embarkation, Fort Mason, California, file No. X472308. The originals of these copies are now on file with the Bureau of Employee's Compensation, Federal Security Agency, located at 4th and Independence Avenue, Southwest, Washington, D. C. This is by direction of the Federal Security administrator, Leo A. Miller, executive assistant.

The Court: The purpose of this offer is to show, or an attempt to show an election on the part of the lady?

(Testimony of Rina Maria Vatuone.)

Mr. Collett: The purpose of this offer is to show the record as to the claim that was filed and the other papers in conformance with the claim and the record and file of the Federal Security Agency in accordance therewith.

Mr. Ryan: If it please your Honor, in regard to this offer, about 95 per cent of this I have no objection to whatever. [108] However, in one question here there is a showing as to what other property she and her husband had at the time of his death, and I think that that part is incompetent, irrelevant and immaterial. I think it is in the nature of a person, for instance, who is killed in an accident who has life insurance or accident insurance. I say, for instance, if we were trying this—not so much before the Court, but if there was a jury, for instance, I think that would be improper to show by way of a document like this that a person has so much life insurance or so much property. The only issue is as to the damages, and the only issue is the amount that that man was earning and whether he used the money on himself or in the support of his family and whether he had other property is an irrelevant matter. So with the exception of this showing of other property, I have no objection; as to the showing on the grounds of other property which is contained in a document called “Affidavit relating to Representatives of Deceased’s Beneficiaries,” I object to that on the ground that it is incompetent, irrelevant and immaterial to that matter.

(Testimony of Rina Maria Vatuone.)

Mr. Collett: If the Court please, the witness has identified her signature to an affidavit sworn to by her and it is a part of this file and record. I do not see where there is any objection.

The Court: The objection is overruled. Of course, it would seem to be elementary that any showing with respect to [109] accumulated wealth or property would have no bearing upon an ultimate award in this case. What relevancy does it have in connection with the investigation undertaken by the Commission?

Mr. Ryan: I do not really know why they asked that question.

The Court: Because it certainly does not enter into their award.

Mr. Ryan: Not a bit.

The Court: In any event, I cannot at present see the materiality and I shall not consider it in any determination that hereafter may be made if liability is found against the defendant United States of America.

The Clerk: Exhibit heretofore marked respondent's D for identification may now be marked as D in evidence?

The Court: Yes.

(Respondent's exhibit D for identification was thereupon received in evidence.)

Mr. Collett: In conjunction with that exhibit, I have a copy of a letter from the Federal Security Agency, Bureau of Employee's Compensation, by

(Testimony of Rina Maria Vatuone.)

the Chief Claims Examiner to Newell A. Clapp, acting assistant Attorney General, United States Department of Justice, dated April 7, in which the computations were made after the amendment to the Act, showing the amount payable to the widow effective as of November 1st, 1949. I would like to offer that along with the other portion of [110] the record.

Mr. Ryan: Your Honor, I am objecting to that on the ground it is incompetent, irrelevant and immaterial and as having to do with the amended compensation law, which she has not chosen to avail herself of.

The Court: Her asserted election had been made prior to that time, and the withdrawal of any application she made, prior to that time.

Mr. Ryan: Definitely.

Mr. Collett: That is a question for this Court to determine as to whether or not, assuming there was an election, that by virtue of the fact that the claim made and the various documents in support of the claim and an award having been made by the Bureau of Employee's Compensation in this case, dated August 3, and an action having been filed two days before, whether or not that in itself is not an election, assuming that there is an election. That contention is made, and the offer in support of it as carrying out the full conclusion——

The Court: As part and partial of your showing I will allow this, subject, of course, to the ultimate

(Testimony of Rina Maria Vatuone.)

interpretation of the Court with respect to the legal problem.

Mr. Ryan: I was just going to say that no matter which way your Honor decided, that would not be relevant because if your Honor decides she did make an election to file this damage [111] suit, she is in this Court properly, and if your Honor finds she did not make an election, she would be under the administrative agency of the Compensation Bureau.

(The exhibit last referred to was thereupon received in evidence and marked respondents' exhibit D-1.)

Cross-Examination

By Mr. Collett:

Q. Mrs. Vatuone, how soon after you had filed a claim did you consult with your attorney?

Mr. Ryan: Object to that on the ground that it is indefinite. She may have seen Mr. McMahon on many things not related to compensation claims.

The Court: I assume you mean when in point of time after filing the claim did this lady consult with Mr. McMahon on that subject.

Mr. Collett: That is correct.

The Witness: It was the week following my application at the Government office for compensation. [112]

Q. (By Mr. Collett): Had your husband left a will?

(Testimony of Rina Maria Vatuone.)

Mr. Ryan: I object to that on the ground that it is incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. (By Mr. Collett): Was your first visit with Mr. McMahon with regard to the compensation claim that you had filed with the Government?

A. My first visit with Mr. McMahon?

Q. Yes, after you filed the claim.

A. Yes, with regard to the compensation.

Q. When did you first ascertain that you could file an action against the United States?

A. When I talked to Mr. McMahon. That is when I ascertained I could file.

Q. Is Mr. McMahon the attorney of the estate of your husband? A. Yes, Mr. McMahon is.

Q. What did Mr. McMahon tell you about your rights as to the claim you had filed and suing the United States notwithstanding that claim?

A. I am sorry, I don't understand that.

(Question read.)

A. At the first meeting he said he would look into it for me.

Q. Did you ask him whether or not you could file a suit against the United States? [113]

A. Yes, I did.

Q. At the time you had the conversation with Mr. Sutherland did he read to you any provisions from a paper or a document and as he explained to you, filed the claim? A. I don't remember.

Q. You don't remember?

A. My mind was pretty much in a turmoil at

(Testimony of Rina Maria Vatuone.)

the time. I couldn't say I remembered yes or no.

Q. Prior to the death of your husband you had lived continuously with him, had you not?

A. Yes, I had.

Q. You had not filed any action for divorce or he had not filed any action for divorce against you?

A. No.

Q. Are you working at the present time?

A. No, I am not.

Q. Were you working at the time of his death?

A. No, I was not.

Q. How much did he usually contribute to the support of your household and to your support out of his paycheck?

A. Well, we lived with my mother-in-law. We paid no rent. My mother-in-law being a widow, we made our home with her, because she wanted someone in the house with her, and I received \$50 a week to cover groceries and incidentals and he took care of whatever doctor bills or clothing bills or whatever expenses [114] over food that we might need, over and above the \$50 week.

Q. With regard to the claim that you filed, in the event that an award was made on such a claim after you filed it, what did Mr. Sutherland advise you that you would receive, that you would be entitled to receive by way of compensation?

A. Well, I was to receive 35 per cent for myself as a widow and 10 per cent for the daughter.

Q. And how long was that to continue?

A. Until my little girl was 18 or until she was

(Testimony of Rina Maria Vatuone.)

married, and for my lifetime, or until I died, or remarried.

Q. When did you decide to file an action against the United States?

A. I don't remember the exact date. You would have to look at the paper to determine that. I don't remember the exact date I decided to do that.

Q. Was that your decision or were you advised so to do by your attorney?

A. No, that was my decision alone.

Q. Did you enter into a contract with your attorney as to what compensation he was to receive as a result of the recovery?

Mr. Ryan: Objected to on the ground that it is incompetent, irrelevant and immaterial. That is a matter between herself and the attorney.

The Court: I cannot see the relevancy. I will sustain the objection. [115]

Mr. Collett: That is all.

Redirect Examination

By Mr. Ryan:

Q. Just one question: Mr. Collett asked you about the fact whether or not Mr. Sutherland said you were going to get 35 per cent as a widow and your daughter 10 per cent as a daughter. Did he tell you that that was not 35 per cent of his salary but 35 per cent of \$175 a month? Do you remember that?

A. I don't remember the amount that he stated.

(Testimony of Rina Maria Vatuone.)

I understood it was 35 per cent for myself, 10 per cent for the daughter.

Q. What did you understand it to mean? 35 per cent of what?

A. I understood it to be 35 per cent of his wages at the time that my husband had died.

Q. Did he tell you that the wage, when considering this percentage under the law, would not exceed \$175 a month?

A. No, that did not enter into it.

Mr. Ryan: That is all.

ROBERT McMAHON

was called as a witness on behalf of the plaintiff and being first duly sworn testified as follows:

The Clerk: Your name is Robert McMahan?

A. That is right.

Direct Examination

By Mr. Ryan:

Q. Mr. McMahan, where do you live, please?

A. 1025 Green Street, San Francisco. [116]

Q. What is your profession?

A. Attorney-at-law.

Q. You are an attorney-at-law? Are you admitted to practice in all the courts of California and the Federal Court?

A. I am.

Q. How long have you been an attorney-at-law?

A. About 34 years.

Q. For many years were you connected with the

(Testimony of Robert McMahon.)

City Attorney's office with the City and County of San Francisco? A. 24 years.

Q. How much? A. 24 years.

Q. Mr. McMahon, you are one of the attorneys for the plaintiff in this action of Vatuone against United States? A. I am.

Q. Did Mrs. Vatuone, after the death of her husband, see you as an attorney?

A. She did.

Q. And because of seeing you as an attorney did she or did she not inquire as to whether or not she had a right to sue the Government for damages for the death of her husband? A. She did.

Q. When she first broached that subject to you, do you remember when that was, by the way?

A. My first meeting, referring to my daily diary, was on the [117] 20th day of July, I believe, or the 20th day of June, or both, or the 15th, I believe, of June, 1949.

Q. At that time was she seeing you on other matters connected with Mr. Vatuone's estate rather than this?

A. With the administration of her husband's estate.

Q. The thing I want to find out is when she questioned you as to her right to sue the Government for damages. How long after that time was that? A. Oh, maybe two or three weeks.

Q. When she did that, did you give her an answer right away or did you advise her that you would have to look into the matter?

(Testimony of Robert McMahon.)

A. I had Mr. Thomas C. Ryan in mind as being a capable rising attorney and as familiar with matters of that kind, and so I took the matter up with yourself, Mr. Tom Ryan.

Q. First of all, you saw her on June 20th and then she asked you this question two or three weeks after that date. Would that be about the middle of July, 1949? A. Approximately.

Q. After that time did you have some conversation with me? In regard to her rights in this matter? A. I did.

Q. After those conferences did you advise her as to her rights?

A. I did, and also in your presence, and you agreed. [118]

Q. When we had that conference with the lady did you advise her that in your opinion she had a right to sue the Government but she must first stop her application for compensation?

A. That is correct.

Q. Did you at that time also discuss with her the amount she would receive by way of compensation and the contingencies which had to exist for her to keep on receiving it?

A. I recall phoning to Mr. Sutherland—I think it was on the 22nd of July—at this building 201 or 207 at Fort Mason, and I was told there that he was off for the day. And subsequently I contacted Mr. Sutherland on the telephone, and I made notes at the time of the conversation, and he in substance told me what the libellant here is testifying to about

(Testimony of Robert McMahon.)

what the base pay would be. I think he said \$270 or words to that effect, and 35 per cent of that to the widow and 10 per cent of that to the minor child.

Q. Did he tell you that the 35 per cent and the 10 per cent was not based on the \$270 base pay but on a total maximum of \$175 a month?

A. That is correct.

Q. He told you that?

A. He did. I have my notes to show that.

Q. That was not the original question, I think. You did not answer the question I tried to ask.

Mr. Collett: Are you going to testify for him now? [119]

(Question read.)

Q. (By Mr. Ryan): When you told her as to what in your opinion she would receive by way of compensation and what her rights were as to bringing suit for damages against the Government, which contingency did she choose to follow?

Mr. Collett: If the Court please, I will submit—withdraw the objection.

A. Without going into detail, I think it would amount to \$78 a month if she accepted the compensation. Otherwise she could bring suit.

Q. Which contingency did she choose to follow?

A. She chose——

Mr. Collett: I object to what she chose to follow. I submit on the record here what the facts show at the time of the complaint having been filed

(Testimony of Robert McMahon.)

and the award having been made will speak for themselves as whether she chose one thing or the other, whether there was any choice to have been exercised.

The Court: What if any instructions did she give to Mr. McMahon in the light of her discussion.

Mr. Ryan: Thank you, your Honor.

Q. What instructions, if any, did she give you as to what she wanted yourself and myself to do as her attorneys?

A. Having in mind, and based upon my conversation with Mr. Sutherland she decided she would bring suit in the Federal Court for damages for the death of her husband.

Q. Acting as her attorney did you send this telegram to the [120] Bureau of the Employee's Compensation in Washington, D. C. (handing document to witness)?

A. I did.

Q. Did you send this telegram by full rate telegram on the day on which it is dated, July 2, 1949?

A. I did.

Mr. Ryan: I offer this telegram in evidence as our next exhibit.

The Court: It may be received and marked.

(Libellant's Exhibit 9 was thereupon received in evidence and read.)

Mr. Collett: If the Court please, I would like to note an objection to the telegram for the record. The proper foundation has not been laid, that the fee was paid, that the telegram was actually trans-

(Testimony of Robert McMahon.)

mitted, there is no record that it was received, when it was received by the Agency or on what authority the United States would have to recognize Mr. McMahon in behalf of Mrs. Vatuone.

The Court: The objection is overruled.

Mr. Ryan: May it please your Honor, I do not think I have to ask the question on this: The record in front of you shows, does it not, that the original libel was filed on August 1st, 1949, in this Court?

The Court: Yes.

Mr. Ryan: And then I think the file also shows an affidavit of Daniel B. Ryan, my brother, showing that on the same date, [121] August 1, 1949, "He personally served a copy of the libel in the above-entitled action on the United States Attorney for the Northern District of California by giving a true copy thereof to Elmer Collett, Deputy District Attorney for said District; affiant on August 1st, 1949, mailed a copy of the libel herein by registered mail to the Attorney General of the United States in Washington, D. C." And I believe that libel was filed in this Court on August 3, 1949.

Mr. Collett: I think the record speaks for itself.

The Court: Whatever the record shows.

Q. (By Mr. Ryan): Then, Mr. McMahon, I think the rest of the correspondence with the United States Government came to my office, is that right?

A. That is correct.

Mr. Ryan: I will have to testify to that. That is all, of Mr. McMahon.

(Testimony of Robert McMahon.)

Cross-Examination

By Mr. Collett:

Q. You say it was two or three weeks after the 15th of June that you discussed with her the question of filing an action against the United States?

A. Approximately, yes.

Q. She advised you she had filed a claim for compensation?

A. She had been out once to see Mr. Chandler, been to Fort Mason.

Q. (By Mr. Ryan): Chandler or [122] Sutherland?

A. Mr. Sutherland, yes, and subsequent to that and immediately thereafter she called on me.

Q. (By Mr. Collett): Did you ask her with regard to the matter of filing a suit whether she wanted to file a suit or did she ask you first?

A. She told me she had been to Fort Mason and had signed some papers with Mr. Sutherland, and I inquired as part of my duties to learn whether she would avail herself of what she could do toward seeking damages for the death of her husband.

Q. Did you ever receive any reply to this telegram that you sent, libellant's Exhibit 9?

A. No, at that time—I then consulted with Mr. Thomas Ryan about anything further. I think there was a letter following that, dictated by Mr. Ryan. I think it has been admitted in evidence for identification. It is addressed to the Bureau in Washington, D. C. After that there was no further correspondence by me with Washington.

(Testimony of Robert McMahon.)

Q. Did you have any other communication with the Federal Security Agency other than this exhibit and the letter that you referred to? A. None.

Q. This letter was airmailed on August 30, is that right?

Mr. Ryan: Just a moment. He said he did not know. That was through my office.

A. I did not do that, Mr. Collett. That was through Mr. Ryan. [123] I may have signed as counsel with Mr. Ryan, but Mr. Ryan prepared that correspondence.

Q. (By Mr. Collett): This is the only attempt you made to communicate with the Federal Security Agency?

A. I think Mr. Ryan wrote a few letters.

Q. I mean you. I am asking you.

A. Oh, no, not personally, no. Mr. Ryan took the stroke oar and I was well satisfied with everything in his hands.

Q. Did you prepare the libel or did Mr. Ryan?

A. Mr. Ryan prepared the libel.

Mr. Collett: No further questions.

Mr. Ryan: No questions.

May it please your Honor, I would like to be sworn to identify this correspondence.

THOMAS C. RYAN

was sworn as a witness on behalf of the plaintiff and testified as follows:

The Clerk: Your name is Thomas C. Ryan?

A. Yes, Thomas C. Ryan.

If it please your Honor, I am one of the attorneys of record in this action. This letter, may it please your Honor, which is marked libellant's Exhibit 7 for identification, was dictated and sent under the following circumstances: A check came from Washington to Mrs. Vatuone for \$118 and some odd cents, which she brought into my office, and I had already [124] explained to her that she could not keep a compensation check and maintain a damage suit at the same time. So she brought it into the office and I sent it back from whence it came, to Washington. I prepared a letter, which I dictated on August 19, and signed. I then sent that letter to Mr. McMahon by mail at the City Hall, requesting him to forward it to Mrs. Vatuone, because I did not know her address in Santa Rosa. He forwarded it to Mrs. Vatuone, and eventually it got back to my hands with Mrs. Vatuone's signature on the bottom of it. It was dated August 29th.

The letter was actually airmailed to New York on August 30. The reason I remember that is because I, on my copy, scratched out the date "August 19th" and had the girl, on the original, put in August 30th, the date it was airmailed out. So at this time, your Honor, having identified that letter,

(Testimony of Thomas C. Ryan.)

and being an answer in response to the check which was received, I ask that this letter be marked in evidence, and then I would like to read it to your Honor.

The Court: It may be marked. Eleven days were spent in transit.

Mr. Ryan: Yes, from me to Mr. McMahon, from Mr. McMahon to Santa Rosa, back to his office, and then finally it got into my hands.

(The document referred to was thereupon received in evidence and marked libellant's Exhibit 7.) [125]

The Witness: I might state this, your Honor: I addressed it to this person because the check came through from this particular person to me. I addressed the letter to Mr. William McCauley, Director, Bureau of Employee's Compensation, Federal Security Agency, Federal Security Building, 4th and Independence Avenue, Southwest, Washington 25, D. C.

"Re: Rina M. C. Vatuone and Paulette T. Vatuone,
"Claimants—Case No. X-472308.

"Dear sir:

"Mrs. Vatuone has just delivered to me the compensation order made in the above matter on August 3, 1949, together with a warrant of the Treasurer of the United States numbered 80,949,-975, dated August 8, 1949, and payable to the order of Mrs. Rina M. C. Vatuone in the sum of \$118.12. I am returning this warrant to you and request

(Testimony of Thomas C. Ryan.)

that you vacate the compensation order above mentioned. The reason for this action is that Mrs. Vatuone and her daughter choose to proceed by way of a suit for damages for death against the United States rather than to accept compensation because of the death of their husband and father.

“On July 22, 1949, our associate, Mr. Robert McMahon, telegraphed your agency requesting that Mrs. Vatuone’s application for compensation be withdrawn. [126]

“Said telegram, which your agency must undoubtedly have on file, reads as follows:

“ ‘July 22, 1949

“ ‘Bureau of Employees Compensation,

“ ‘Federal Security Agency,

“ ‘Federal Security Building,

“ ‘4th and Independence Avenue, S.W.,

“ ‘Washington 25, D. C.

“ ‘Request application of Rina Maria Vatuone for compensation on death of Paul D. Vatuone be withdrawn without prejudice. Reason: Contemplate damage suit against United States.

“ ‘ROBERT McMAHON,

“ ‘Attorney for Mrs. Vatuone; 206 City Hall,
San Francisco 2.’

(Testimony of Thomas C. Ryan.)

“Mr. Wm. McCauley, Director,
“Bureau of Employees Compensation,
“Federal Security Agency,
“Federal Security Building,
“4th and Independence Avenue, S.W.,
“Washington, 25, D. C.

“On August 1, 1949, in the District Court of the United States, for the Northern District of California, Southern Division, Mrs. Vatuone, as administratrix of the Estate of Paul D. Vatuone, deceased, filed a libel for damages in the sum [127] of \$100,000.00 against the United States. Said action is entitled Rina Maria Vatuone, as administratrix of the Estate of Paul D. Vatuone, deceased, Libellant, vs. United States of America, Respondent, numbered 25476R in the files of said Court. Said libel and a citation were on the same date served on the United States by delivering a copy of said libel and citation to Frank J. Hennessy, United States Attorney, at San Francisco and mailing a copy of said libel and citation by registered mail to the Attorney General of the United States at Washington, D. C.

“In view of said facts, please make your order vacating said compensation order and do not send any further warrants to Mrs. Vatuone, I enc.

“Sincerely,

“RYAN & RYAN,

“By THOMAS C. RYAN.

(Testimony of Thomas C. Ryan.)

“Please comply with the requests contained in Mr. Ryan’s letter above.

“Dated: August 29, 1949.

“RINA M. C. VATUONE.”

The Witness: Then, may it please your Honor, in answer to that letter that I just read, I received the following letter dated September 8, 1949, from the Bureau of Employees’ Compensation. I personally received this letter in reply to [128] that one, and I offer that one in evidence.

The Court: It may be marked in evidence.

Mr. Collett: Let me see that.

Mr. Ryan: I think you have a copy of that. You should have a copy of all those in your file.

(The document referred to was thereupon received in evidence and marked libellant’s exhibit No. 10.)

Mr. Ryan: This letter, may it please your honor, libellant’s Exhibit 10, is on the stationery of the Federal Security Agency, Bureau of Employees’ Compensation, Washington 25, D. C.:

“September 8, 1949,

“Ryan and Ryan,

“Attorneys at Law,

“800 Phelan Building,

“San Francisco 2, California.

“Gentlemen:

“Your letter of August 19, 1949, relative to Mrs. Rina M. C. Vatuone, widow of Paul D. Vatuone,

(Testimony of Thomas C. Ryan.)

deceased, who was fatally injured June 15, 1949, while employed as rigger helper for the Department of the Army on the U. S. Army Transport 'General D. E. Aultman,' San Francisco Port of Embarkation, Fort Mason, California, and Paulette T. Vatuone, child of this decedent, has been received and referred to the writer for reply. [129]

"The Bureau of Employees' Compensation has no authority of law to vacate the Compensation Order issued in this claim on August 3, 1949.

"The United States Treasury will be requested to hold the compensation check for \$118.12 issued to the order of Mrs. Rina M. C. Vatuone.

"The Attorney General, United States Department of Justice, Washington, D. C., is handling the libel for damages filed by Rina Maria Vatuone, as Administratrix of the Estate of Paul D. Vatuone, deceased, vs. United States of America, Northern District of California, and any future communications concerning the libel suit should be directed by you to the Attorney General, Department of Justice, Washington, D. C.

"Very truly yours,

"DANIEL M. GOODACRE,

"Chief Claim Examiner."

And a copy of that letter was sent to Mrs. Vatuone.

Then, may it please your Honor, another compensation check came through, despite these letters, to Mrs. Vatuone and she brought the check into me

(Testimony of Thomas C. Ryan.)

and requested me to send it back to the Government, and so in compliance with the request, on September 23, 1949, I sent the following letter to the person who sent me the check, who was the chief of the preliminary [130] service section of the general accounting office, claims division, Washington 25, D. C.:

“Re: Z-154352,

“Vatuone, Paul D., deceased.

“Dear Sir:

“On behalf of Mrs. Rina M. C. Vatuone, widow of the above decedent, and Paulette T. Vatuone, his daughter, I am returning to you warrant No. 88,-246,693 of the Treasurer of the United States, dated September 1, 1949, and payable to the order of Mrs. Rina M. C. Vatuone in the sum of \$78.75.

“As I wrote Mr. Wm. McCauley, Director of the Bureau of Employees' Compensation, Federal Security Agency, Mrs. Vatuone and her daughter have elected to proceed against the United States on account of the death of Mrs. Vatuone's husband and Miss Paulette T. Vatuone's father by means of a suit for damages for personal injuries which has heretofore been filed in the Federal Court in San Francisco, No. 25476-R.

“Mr. Daniel M. Goodacre, Chief Claim Examiner, wrote me on September 8, 1947, stating that the United States Treasury will be requested to hold the compensation check heretofore sent Mrs. Vatuone in the sum of \$118.12, which we heretofore returned to the Government. His file number on her case is

(Testimony of Thomas C. Ryan.)

X-472308. [131] Please do not send any further monthly checks to Mrs. Vatuone, as she is proceeding against the Government by means of said damage suit. We notified the Government of this election by a telegram sent July 22, 1949, before the compensation order was made by the Bureau of Employees' Compensation.

“Very truly yours,

“RYAN & RYAN,

“By THOMAS C. RYAN.”

I offer that in evidence, your Honor.

The Court: It may be marked.

(The document referred to was thereupon received in evidence and marked libellant's exhibit 11.)

Mr. Ryan: I then received a reply to that letter by a letter under the letterhead of General Accounting Office, Washington 25, D. C., Claims Division, Dated October 24, 1949, as follows:

“Ryan & Ryan,

“Attorneys at Law,

“800 Phelan Building,

“San Francisco 2, California.

“Sirs:

“Reference is made to your letter dated September 23, 1949, wherein it is requested that no further monthly employees' compensation checks be sent to [132] Mrs. Rina M. C. Vatuone in view of the

(Testimony of Thomas C. Ryan.)

filing of a suit for personal injuries against the United States by Mrs. Vatuone and her daughter, Miss Paulette T. Vatuone, on account of the death of Paul D. Vatuone.

“You are advised that the letter has been referred to the Federal Security Agency, Bureau of Employees’ Compensation, Washington, D. C., as a matter for consideration and appropriate action by that office.

“Any further inquiry with regard thereto should be addressed to that office.

“Respectfully,

“FOR THE COMPTROLLER GENERAL OF
THE UNITED STATES,

“E. B. HILLEY,

“Claims Reviewer.”

I offer that letter in evidence.

(The document referred to was thereupon received in evidence and marked libellant’s exhibit No. 12.)

Mr. Ryan: Then, may it please Your Honor, another branch of the Government, that is, the retirement division, wrote some letters requesting Mrs. Vatuone to fill in some forms and she brought them in to me, and they had to do not with compensation but with retirement allowances that he had as [133] Government employee, by which she was to get two dollars a month or twelve dollars apiece a year, and she had to, under the provisions of that law, make

(Testimony of Thomas C. Ryan.)

a choice between accepting compensation or these retirement allowances. So I wrote the following letter to the Retirement Bureau stating that we had already rejected compensation and we would accept the two dollars a month she was entitled to under retirement, and I sent this letter on her behalf:

“January 6, 1950

“Mr. Warren B. Irons, Chief,
“Retirement Division,
“U. S. Civil Service Commission,
“Washington 25, D. C.

“Re: RET-CL:MVH:jf
CSF-174240

“Dear Mr. Irons:

“Replying to your letters of October 31, 1949, and December 12, 1949, this is to advise you that on my own behalf and on behalf of my minor daughter, Paulette Theresa Vatuone, we hereby elect to receive an annuity under the provisions of the Retirement Act rather than dependency compensation under Section 10 of the U. S. Employees' Compensation Act.

“Heretofore we chose the remedy of a suit for damages for personal injuries against the United States rather than accepting the benefits [134] afforded us under the U. S. Employees Compensation Act. On August 1, 1949, in the District Court of the United States, for the Northern District of California, Southern Division, in an action entitled Rina Maria Vatuone, as administratrix of the

(Testimony of Thomas C. Ryan.)

Estate of Paul D. Vatuone, libellant, vs. United States of America, respondent, No. 25476 in the files of said court, I brought suit for damages in the sum of \$100,000.00 against the United States under the provisions of the Public Vessels Act. Prior to that time and on July 22, 1949, my attorneys telegraphed the Bureau of Employees' Compensation at Washington, D. C., requesting that my application for compensation be withdrawn because I was contemplating a damage suit against the United States. Despite said telegram and the filing of said lawsuit, the director of the Bureau of Employees' Compensation made an award of compensation in my case on August 3, 1949. Pursuant to said order, compensation checks were sent to me. However, I did not accept them, but returned them to the Chief of the Preliminary Service Section of the General Accounting Office, Claims Division of Washington. I also notified the director of [135] the Bureau of Employees Compensation that we were returning said checks and not accepting the compensation order made and requested said director to make an order vacating his compensation order.

“In view of the above, I will expect to receive from your office monthly annuities for myself and my daughter under the provisions of the Retirement Act.

“In your letter of October the 31st you state that my daughter and I are each entitled to an annuity

(Testimony of Thomas C. Ryan.)

of \$12.00 per annum. Is that correct, or did you mean \$12.00 per month each?

“Sincerely,

“RINA M. VATUONE.

“RYAN & RYAN,

“By THOMAS C. RYAN,

“Attorneys for Rina M.
Vatuone.”

And I might state in answer to that inquiry they said it was \$12.00 a year and not a month. I offer this letter in evidence.

(The document referred to was thereupon received in evidence and marked libellant's exhibit 13.)

Mr. Collett: Mr. Ryan, will you produce the two letters which you received to which you replied?

Mr. Ryan: I will look through my files and see if I can find them. [136]

If your Honor please, at this time I read into evidence——

Mr. Collett: Before you finish—you are on the stand—I asked you to produce those two letters.

Mr. McMahon: They are not in the file.

Mr. Ryan: I could find those in a few moments.

Mr. Collett: I would like to close out that phase of it.

Mr. Ryan: I am not sure I have the letters. No, I haven't got those in my file.

(Testimony of Thomas C. Ryan.)

Mr. Collett: What did the letter of October 31st contain?

Mr. Ryan: It referred to retirement benefits.

Mr. Collett: And the letter of December 12th?

Mr. Ryan: On the same subject, I haven't got those letters counsel referred to, your Honor.

The Court: What are the letters?

Mr. Ryan: They were letters from the retirement board about this two dollars a month or twelve dollars a year, asking for her to make a choice between compensation and retirement, and I said we had already rejected the compensation so we accepted retirement.

The Court: All right.

Mr. Ryan: At this time, your Honor, I read into evidence the insurance commissioner's 1941 mortality table, showing that a person of the age of 44 years has a life expectancy of 26.1 years, and I also read into evidence the present worth of one dollar per year tables, showing that the present value [137] of an annuity of one dollar per year for 26 years, discounted at 3 per cent, is \$17.87, at 2 per cent it is \$20.12, and I will ask counsel if he will enter into this stipulation. I think it may be in one of his own records. Will you stipulate that death was due to the injury he received in this accident of June 15, 1949?

The Court: That is in the Government's Exhibit. The certificate is in the file offered by Mr. Collett and signed by Doctor Geiger and certified to. Is it stipulated that death was caused proximately as a

(Testimony of Thomas C. Ryan.)

result of the injuries sustained here? Is that the stipulation?

Mr. Ryan: Yes.

Mr. Collett: That is not necessary for me to stipulate. The records show that.

Mr. Ryan: With that the libellant rests.

Mr. Collett: If the Court please, I will at this time renew the motion to dismiss on the grounds, first, there was no election to sue. First, we have here an individual who was an employee of the United States, and that as such an employee of the United States—not a seaman, not a member of the crew of the vessel—that there wasn't any election and that, second, by virtue of the provisions of sections 789 and 746, the United States as the employer of Vatuone was not liable to any greater extent than any other owner of the vessel employing Vatuone in a similar manner would be, and that the [138] Harbor Workers and Longshoremen's Compensation Act would provide the exclusive remedy as to such an employee, and that the United States thereby is not liable to any greater extent, and that the compensation act provides the exclusive remedy on that ground. On the third ground, that the filing of the claim, and the making of the award and the facts of this case constitute a bar to the libellant in any further proceedings.

The Court: I will reserve ruling on the matter.

Mr. Collett: I have only one witness, if the Court please. I would like to call Mr. Sutherland, very briefly.

WALTER ROBERT SUTHERLAND

was called as a witness on behalf of the respondent, and being first duly sworn, testified as follows:

The Clerk: Will you state your full name to the Court?

A. Walter Robert Sutherland.

Direct Examination

By Mr. Collett:

Q. By whom are you employed, Mr. Sutherland?

A. San Francisco Port of Embarkation, Fort Mason.

Q. Where do you live? A. Mill Valley.

Q. How long have you been employed by the San Francisco Port of Embarkation? That is the water transportation division part of the Army?

A. Yes, Department of the Army, Transportation Corps.

Q. Transportation Corps, Department of the Army? [139] A. Yes.

Q. How long have you been employed by the Department of the Army?

A. Three years in the transportation Corps, ten in the Department of the Army altogether.

Q. In your present employment, assignment to duty?

A. At the present time I have only been in that duty less than a month.

Q. What is your present duty?

A. I am claims examiner for the Judge Advocate and Claims Division.

(Testimony of Walter Robert Sutherland.)

Q. In June, 1949, what was your duty?

A. I was contact representative of the Claims and Compensation Unit, Civilian Personnel Branch at Fort Mason.

Q. That is, Department of the Army?

A. That is, yes.

Q. About June 15, 1949, do you recall receiving a report of the death of Paul D. Vatuone?

A. I do.

Q. Did you thereafter endeavor to communicate with Mr. Rina Maria Vatuone? A. I did.

Q. You endeavored to contact her on being notified of the death of Paul Vatuone, is that right?

A. Yes. [140]

Q. Did you succeed in contacting her?

A. We established contact. Whether I succeeded in contacting her first or she did me, I don't recall.

Q. Where did you have your first visit with her?

A. Our first personnel building was building 207, our personnel office, Fort Mason.

Q. Do you recall the date?

A. Not precisely. It was five or six days after the death of Paul Vatuone.

Q. Did you have a conversation with her at that time? A. Yes.

Q. Do you recall the time of day?

A. No, I do not.

Q. Do you recall who was present?

A. Well, Mrs. Vatuone and myself. It was an open office. There were others at a distance.

(Testimony of Walter Robert Sutherland.)

Q. There was no other person who was participating or auditing the conversation as such?

A. No.

Q. Will you give us the sum and substance of that conversation?

A. Well, at the outset I expressed my sympathies and those of the Port in offering such services as we could provide to her in connection with his personnel problems, and so on, and I explained the benefits provided by the compensation Act in such a case. I explained in part, with one omission, such [141] benefits where she was entitled to claim and how she should proceed to claim them, that is, the necessary form work and such supporting documents of the proof of her relationship as the Bureau would require—by that I mean birth certificates, marriage certificates, et cetera.

Q. What benefits did you tell her she was entitled to?

A. I told her she was entitled to 35 per cent of her husband's pay until she died or remarried, and that her minor child was entitled to 10 per cent of that pay until she died, remarried or ceased to be dependent.

Q. You stated there was an omission?

A. There was.

Q. What was that?

A. I omitted to state that for compensation computing purposes the maximum salary that these percentages I just quoted were based upon was \$175 per month.

(Testimony of Walter Robert Sutherland.)

Q. Instead of how much?

A. I didn't follow that.

Q. Instead of how much?

A. Instead of a full 35 per cent of his pay, actually it is 35 per cent of \$175 if the decedent's salary is in excess of \$175.

Q. Did she direct you to prepare forms for presenting a claim?

Mr. Ryan: Just a moment. I object to that on the ground [142] that it is leading and suggestive: Did she suggest that. I have no objection if he asks what he did.

The Court: State what you did, please, Mr. Sutherland.

A. I went into further explanation as to the forms that were required and offered my services specifically that I would draft in longhand on the form the necessary replies to the questions on a claim for compensation and have it typed up by one of my typists for her signature.

Q. Did you have any discussion with regard to filing a suit against the United States?

A. I don't recall any.

Q. Do you recall any discussion with regard to recovery from any other source than the United States as a set-off against any compensation that she might receive?

A. I honestly do not recall that subject coming into that particular conversation.

Q. You heard Mrs. Vatuone testify to the effect

(Testimony of Walter Robert Sutherland.)

that she could file suit and any compensation that she might receive would be a set off as against any recovery that she would make in the suit?

A. I heard the testimony, yes.

Q. Did you have any such conversation with her?

Mr. Ryan: I object to that on the ground that it is already asked and answered. He said he does not recall whether he did or not. [143]

A. I don't recall the subject of a suit coming into that particular conversation.

Q. (By Mr. Collett): Did you discuss that in any other conversation with her?

A. Not to my recollection.

Q. Thereafter did you prepare—what is the designation on the form for filing a claim in the event of death?

A. C-A 5.

Q. Did you thereafter have such a form typewritten from the information that was given to you by her?

A. Yes.

Q. I will show you respondent's exhibit D, CA-5. That is your signature, is it? A photostatic copy?

A. It is.

Q. Did she thereafter provide the various documents which were attached to it: The marriage license, certificate of marriage, abstract of marriage record, the certification of the birth of Paulette Teresa Vatuone, and the certified copy of the death certificate of the San Francisco Department of Public Health?

A. She provided all except the death certificate.

Q. How did you obtain the death certificate?

(Testimony of Walter Robert Sutherland.)

A. I obtained that directly from the Department of Public Health by letter.

Q. I will show you this exhibit, Respondent's Exhibit D, and the other documents that were enclosed in here, in addition to [144] the CA-5, were CA-3—what is a CA-3?

A. CA-3 is the employer's report of the death.

Q. And that was signed by you, was it, on the 24th of June 1949? A. Yes.

Q. What form is a CA-2?

A. That is the official superior's report of injury.

Q. Who prepares that?

A. In this case an immediate superior or someone in an echelon or one or two above him.

Q. Was that form received by you in the regular course of the performance of your duties?

A. It was received in a routine manner. I had telephoned and asked them to expedite it.

Q. CA-1—what form is that?

A. That is the employees' notice of occupational injury or illness.

Q. What purpose does it serve?

A. Primarily it is for the employee to make his own report to the Bureau of his own injury and claim that it was occupational. When the employee is not available or cannot execute his own, the Bureau's regulations and instructions are that the employer or someone should execute it in his behalf.

Q. Who executed it in his behalf?

A. I did. [145]

(Testimony of Walter Robert Sutherland.)

Q. And this bears your signature, does it?

A. Yes.

Q. Form No. 2307, TC7. That is a Medical Report of Civilian Industrial Accident. Do you receive that and forward it to the Federal Security Agency or is that forwarded directly?

A. That is a local form of our dispensary. We forward it to the Bureau as a matter of policy.

Q. There is an affidavit relating to representatives of deceased's beneficiary. Was that prepared in your presence?

A. No, I am not familiar with that form.

Q. I show you the form. Have you ever seen that before?

A. I have seen it.

Q. Did you receive this form from Mrs. Vatuone?

A. I cannot recall just exactly the circumstances under which I received it, but I do know that it came to my office.

Q. Did you at any time have any conversation with Mrs. Vatuone regarding any rights that she might have to file suit against the United States in addition to filing a claim against the United States for compensation under the employees' compensation act?

A. I talked with someone about that time—I can't recall whether it was Mrs. Vatuone or a telephone call from a gentleman that came along a week or two later on the subject.

Q. Do you recall a telephone conversation from a gentleman?

(Testimony of Walter Robert Sutherland.)

A. Yes, I recall having had one. [146]

Q. Do you recall his name?

A. He identified himself as Mr. McMahon or McCann. I think it was McMahon.

Q. How did he represent himself, if you recall?

A. I am not definitely certain whether it was a friend of Mrs. Vatuone or Mrs. Vatuone's attorney.

Q. What was the substance of your conversation?

A. That Mrs. Vatuone was electing to sue and he was notifying—I don't recall the exact words, but the essence of it was he was notifying the Bureau to drop her claim for compensation and he was also notifying me that she did not want to proceed any further, and the question of compensation benefits was put to me as to what she was entitled to, and I explained the percentages—35 for the widow, 10 for the child.

Q. Would that refer to the amount \$175 in that conversation?

A. I don't recall. It got down to dollars and cents, in the course of the conversation, where it got specific, but I am very hazy about it. I would like to explain, if I may, that since that time I have interviewed hundreds of other people, not all as tragic perhaps, but through the course of so many interviews, unless something particularly salient impresses me, I do not retain it.

The Court: Do you make a memorandum of the phone calls? A. No your Honor.

Mr. Collett: No further questions. [147]

(Testimony of Walter Robert Sutherland.)

The Court: Proceed.

Cross-Examination

By Mr. Ryan:

Q. Mr. Sutherland, you mentioned the omission that when you were giving this figure of 35 per cent and 10 per cent of the salary, you forgot to mention \$175 a month was the maximum. Actually Mr. Vatuone was earning more than \$175 a month, wasn't he?

A. Yes, he was earning more than that.

Q. He was earning around \$270 a month, wasn't he?

The Court: His average shows \$250.

Q. (By Mr. Ryan): Let me ask you this. This is the thing I want to get at mostly: Counsel questioned you about the conversation Mrs. Vatuone had with you in which she said you mentioned you could get your compensation and then sue the United States, but you would have to deduct from the amount of the award against the United States the amount of compensation paid out, and your answer was you did not recall that.

A. I do not recall actually having that discussion.

Q. But, Mr. Sutherland, at that time it was your impression, wasn't it, that a person had a right to file a damage suit and file a compensation claim at the same time? That was your impression?

Mr. Collett: I object to what his impression was.

The Court: Overruled.

A. I had no specific impression because I am not

(Testimony of Walter Robert Sutherland.)
qualified. [148] I am a layman and do not know the law, but had it been put to me, it did seem a logical course.

Q. (By Mr. Ryan): As a matter of fact, you had a lot of claims like this, didn't you, where Government employees were hurt by third parties, they get their compensation from the Government, and they would sue the third parties, but the Government would get back the money they paid in compensation from the third party tort feasers? You had a lot of cases like that, didn't you?

A. Not a lot.

Mr. Collett: I object to that as wholly immaterial.

The Court: I think he has sufficiently testified on the other point. He said it seemed logical.

Mr. Ryan: I will put one more question then:

Q. You are not here denying that you might have told her that she could sue and get compensation at the same time; that is correct, isn't it?

A. I wouldn't tell her she could sue because I wouldn't know under what circumstances anyone could sue.

Q. You won't deny the fact, as she testified, that she asked you about the suit and the fact that she could sue? And the amount would be reduced by the amount of compensation she was paid? You won't deny that you told her that, will you?

A. In the words that you put it, I will.

Q. I do not mean in my words, but in general language, the inquiry came up? As to whether or

(Testimony of Walter Robert Sutherland.)

not she could get compensation [149] and also would have the right to sue. You don't deny that that subject matter came up, will you?

Mr. Collett: I object, if the Court please. He has answered the question. It is purely argumentative now. There are express provisions in the Act with regard to other claims and the set off as against compensation in the Compensation Act itself. Now the witness has been asked whether he would deny it.

The Court: You may answer the last question if it is clear to you.

Mr. Collett: Repeat the question.

Mr. Ryan: I think he understands it.

The Witness: I at no time told Mrs. Vatuone or anyone else that they could sue—I mean because I do not know the circumstances under which anyone can sue for anything. But I have had similar questions put to me throughout my experience and I won't deny Mrs. Vatuone may have put the same question to me, that if he claims for compensation and recovers from any other source other than private insurance, that is, through suit, most particularly third party cases, that the Bureau will use that as an offset against any compensation that they pay the claimant.

Q. Going one step further, neither will you deny that you may have told her that if such a situation arose in this case, the amount that Fort Mason, the Compensation Bureau pays her, would be deducted from the amount of recovery in the

(Testimony of Walter Robert Sutherland.)
damage [150] suit against the United States? You won't deny that either, will you?

A. I won't deny it.

Mr. Ryan: I think that is all, your Honor.

Redirect Examination

By Mr. Collett:

Q. Do I understand you, Mr. Sutherland, to say that you do not deny that you told her if she recovered in an action against the United States that the amount of compensation she would receive would be offset as against it?

A. The amount she would receive through any other source would be offset against the compensation.

Q. Is there any provision in the Compensation Act with regard to offset as against compensation?

Mr. Ryan: I object on the ground that calls for the conclusion of the witness. The Compensation Act itself is the best evidence.

The Court: Overruled.

A. There is a section—I can't quote it or identify it by section number—that specifies that if the claimant recovers from another source and it appears to bear altogether on third party cases, that that amount will be used as an offset or credit to his compensation.

Q. (By Mr. Collett): You have in mind Section 777 of Title 5 of the United States Code——

Mr. Ryan: Your Honor, I would like to inquire

(Testimony of Walter Robert Sutherland.)

as to whether [151] he is inquiring as to his present knowledge. He may have learned a lot since the last June.

Q. (By Mr. Collett): I will ask you this: After June 15 were you aware of the existence in the code or the Compensation Act of a section pertaining to the adjustment in the case of a receipt by an employee of money and property in satisfaction of liability of a third person? A. Yes.

Q. Was the section you had in mind with regard to a setoff as against any compensation that might be due on a recovery by a person?

A. Yes.

Q. Have you received any instructions in your department with regard to advising any claimant to sue the United States? A. Yes.

Q. What was that?

Mr. Ryan: Just a moment. What do you mean? Since this time or before it?

Mr. Collett: Prior to June 15, 1949.

A. Yes, I had been specifically instructed, prior to June 15.

Mr. Collett: With regard to what?

A. With regard to advising or discussing suits or any legal aspects, outside of the Compensation Act with any claimant.

Q. In your conversations with Mrs. Vatuone did you so abide by those instructions? [152]

Mr. Ryan: I object to that on the ground that it calls for the opinion and conclusion of the witness, and furthermore he says he does not remember.

(Testimony of Walter Robert Sutherland.)

The Court: Yes. Well, I will allow it.

A. Do I answer the question?

The Court: Yes, you may answer the question.

A. As I say, I do not recall discussing the aspects of a suit with Mrs. Vatuone.

Mr. Collett: That is all.

Mr. Ryan: That is all.

The Court: We will resume then tomorrow at 10:00 o'clock?

Mr. Ryan: I understand counsel is finished with his evidence?

Mr. Collett: That is all.

Mr. Ryan: Then we can argue the matter tomorrow morning?

The Court: Yes.

(Thereupon on June 7th, 1950, counsel for the respective parties argued the matter to the Court, the matter to be submitted when the briefs of the counsel are filed.)

Certificate of Reporter

We, Official Reporters and Official Reporters pro tem, certify that the foregoing transcript of 153 pages is a true and correct transcript of the matter therein contained as reported by us and thereafter reduced to typewriting, to the best of our ability.

/s/ J. F. SWEENEY,

/s/ K. PECK.

[Endorsed]: Filed September 21, 1950. [153]

In the United States Court of Appeals
for the Ninth Circuit

No. 25476-R In Admiralty

UNITED STATES OF AMERICA,

Appellant,

vs.

RINA MARIA VATUONE, as Administratrix of
Estate of PAUL D. VATUONE, Deceased,
Appellee.

CLERK'S CERTIFICATE TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this court in the above-entitled case and that they constitute the record on appeal herein as designated by the parties:

Libel for Damages for Wrongful Death.

Answer.

Memorandum Opinion and Order.

Findings of Fact and Conclusions of Law.

Decree for Damages.

Notice of Appeal.

Petition for Appeal.

Order Granting Petition for Appeal.

Assignment of Errors.

Citation on Appeal.

Affidavit of Mailing copies of Notice of Appeal, etc.

Designation of Apostles on Appeal and Prae-cipe therefore.

One volume of testimony.

Libellant's Exhibit No. 1, for identification.

Libellant's Exhibits Nos. 2 to 3, inclusive.

Libellant's Exhibit No. 4, deposition.

Libellant's Exhibits Nos. 5 to 7, inclusive.

Libellant's Exhibit No. 8, deposition.

Libellant's Exhibits Nos. 9 to 13, inclusive.

Respondent's Exhibits A, B, C and D.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 20th day of April, 1951.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ E. H. NORMAN,
Deputy Clerk.

[Endorsed]: No. 12906. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Rina Maria Vatuone, as Administratrix of the Estate of Paul D. Vatuone, Deceased, Appellee. Apostles on Appeal. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed April 20, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 12906

RINA MARIA VATUONE, as Administratrix of
the Estate of Paul D. Vatuone, Deceased,
Appellee,

vs.

UNITED STATES OF AMERICA,
Appellant.

APPELLANT'S STATEMENT OF POINTS TO
BE RELIED ON ON APPEAL AND DESIG-
NATION OF PORTION OF RECORD TO
BE PRINTED

Appellant adopts as points on appeal the Assignment of Errors included in the Apostles on Appeal on file herein.

Appellant designates for printing the entire Apostles on Appeal on file herein except that, as to the Exhibits, only Libellant's Exhibit 4 and Libellant's Exhibit 8 need be printed, and that the remaining Exhibits be considered by the Court in their original form.

/s/ FRANK J. HENNESSY, R.,
United States Attorney.

/s/ KEITH R. FERGUSON,
Special Assistant to the Attorney General, Proctors
for Appellant.

So Ordered:

.....

Senior United States Circuit
Judge.

[Endorsed]: Filed April 28, 1951.

[Title of Court of Appeals and Cause.]

STIPULATION AS TO EXHIBITS

It Is Hereby Stipulated and Agreed by and between Appellant and Appellee, acting by and through their respective proctors, that in order to save further costs of printing, all exhibits heretofore admitted in evidence herein, except Libellant's Exhibits Nos. 4 and 8, need not be printed, and that the same may be considered by the Court in their original form.

Dated this 26th day of April, 1951.

/s/ FRANK J. HENNESSY, W.P.,
United States Attorney.

/s/ KEITH R. FERGUSON,
Special Assistant to the Attorney General, Proctors
for Appellant.

RYAN & RYAN,
By /s/ THOMAS C. RYAN,
/s/ ROBERT McMAHON,
Proctors for Appellee.

So Ordered :

/s/ WILLIAM HEALY,

/s/ HOMER BONE,

/s/ WM. E. ORR,

United States Circuit Judges.

[Endorsed]: Filed April 28, 1951.

No. 12906

**In the United States Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, RESPONDENT-APPELLANT
v.

RINA MARIA VATUONE, AS ADMINISTRATRIX OF THE
ESTATE OF PAUL D. VATUONE, DECEASED

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVI-
SION

BRIEF FOR THE UNITED STATES

JAMES B. BROWNING,
Acting Assistant Attorney General,
CHAUNCEY F. TRAMUTOLO,
United States Attorney,
LEAVENWORTH COLBY,
KEITH B. FERGUSON,
Special Assistants to the Attorney General,
C. ELMER COLLETT,
Assistant United States Attorney,
Attorneys for the United States.

FILED

SEP 11 1951

U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 12906

UNITED STATES OF AMERICA, RESPONDENT-APPELLANT

v.

RINA MARIA VATUONE, AS ADMINISTRATRIX OF THE
ESTATE OF PAUL D. VATUONE, DECEASED

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVI-
SION

BRIEF FOR THE UNITED STATES

JURISDICTION

The jurisdiction of the District Court rests upon the Public Vessels Act, 1925 (46 U. S. C. 781-789) by reason of a libel in admiralty, filed August 1, 1949, to recover damages for the death of libelant's decedent aboard the U. S. A. T. *General D. E. Aultman* on June 15, 1949.

This Court's jurisdiction rests upon 28 U. S. C. 1291 by reason of a notice of appeal, filed March 26, 1951, from a decree in favor of the libelant entered on December 29, 1951.

QUESTIONS

Libelant's decedent, a civil service employee of the United States, serving in a shoreside position with the Army Transport Service, was killed in the performance of duty aboard an Army Transport undergoing repairs at an Army Base. His widow had two remedies, one under the Public Vessels Act, the other under the Federal Employees' Compensation Act. She first applied for compensation and then brought this suit to recover damages for wrongful death. When she received the compensation checks she returned them. The questions presented are—

1. Whether, in the absence of an explicit statutory direction for double recovery or election, government personnel or their dependents have a right of action against the United States for injury or death in the performance of duty or must accept as their sole recovery the benefits of the compensation, leave, and retirement statutes applicable to personnel of their type.

2. Whether applying for benefits under the applicable compensation statutes precludes government personnel or their dependents from thereafter maintaining suit for injury or death against the United States.

STATUTES

The Federal Employees' Compensation Act, 1916, c. 458, 39 Stat. 742, as originally enacted and as in effect at all times here involved provided in pertinent part:

[SEC. 1.] That the United States shall pay compensation as hereinafter specified for the

disability or death of an employee resulting from a personal injury sustained while in the performance of duty * * *

SEC. 7. That as long as the employee is in receipt of compensation under this Act, or, if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed, and except pensions for service in the Army or Navy of the United States.

STATEMENT

The facts respecting the injury of libelant's decedent Paul D. Vatuone are not disputed and may be summarized from the findings of the court below (R. 14-17). Vatuone was a shoreside civil service employee of the Army Transport Service working as a rigger in the marine repair shop at Fort Mason, San Francisco Port of Embarkation. With fellow workmen he was sent aboard the Army Transport *General D. E. Aultman* on June 15, 1949, to do certain repairs on one of the davits of No. 5 lifeboat (R. 15). Vatuone and another workman were manually winding a cable around the drum of the winch which operated the boat when other fellow workmen¹ "negligently put in operation the motor operating said winch so that said winch suddenly

¹ Specifically, libelant's attorney contended it was the ship's electrician. See R. 31-33, 120-121.

and very swiftly revolved around and the handle of said winch struck said decedent with such force that he was thrown violently to the deck and was killed." Libelant was survived by his dependent widow and his infant daughter (R. 16).

The facts in respect of libelant's claim and award of compensation appear from the file of the Bureau of Employee's Compensation. (Respondent's Exhibit D, in evidence R. 185-187.) On June 16, 1949, there was executed Bureau of Employees' Compensation Form C. A. 2, "Official Superior's Report of Injury" certifying Vatuone's accident to have been in the actual performance of duty (photostat 15-16). On June 23, 1949, libelant executed the Bureau's Form C. A. 5, "Claim for Compensation on Account of Death" (photostat 20-21) and on June 28, 1949, she executed Form C. A. 42, "Affidavit Relating to Representatives of Deceased Beneficiaries" (photostat 9-10). In the interval various other forms and statements appear to have been executed and copies of death, marriage, and birth certificates obtained and all necessary papers duly filed with the Bureau of Employees' Compensation. On the basis of this information, the Director of the Bureau, pursuant to Section 36 of the Compensation Act (5 U. S. C. 786) on August 3, 1949, made findings of fact and an award of compensation (photostat 2-4). The award allowed burial expenses of \$200 and compensation at the monthly rate of \$78.75, consisting of \$61.25 for libelant and \$17.50 for the child and advised libelant that about August 10, 1949, a check for \$118.12, ac-

crued compensation for the period June 16 to July 31, 1949 would issue (photostat 2-4).²

Meanwhile, libelant had brought the present suit on August 1, 1949 (R. 1) and, acting on the advice of her attorneys, when she received the initial compensation check for \$118.12, dated August 8, 1949, she returned it and thereafter returned all other checks (R. 133-137, 189-190, 195-197, 201-209, 221-222). The court below followed *United States v. Marine*, (4th Cir., 1946) 155 F. 2d 456, and held the availability of compensation did not preclude recovery by suit. He further summarized his view of the effect of libelant's conduct as follows (R. 12-13):

The sequence of events in Mrs. Vatuone's case demonstrates that she commenced her libel under the Public Vessels Act after she had filed her claim but before an award was made by the government. She returned her check in the amount of \$137.28 to the government when it arrived and at no time did she accept any compensation. These facts place the instant case within the language of *Mandel*

² By reason of the amendments to the Compensation Act by the Act of October 14, 1949, c. 691, 63 Stat. 854, this amount was increased effective November 1, 1949, and would now amount to \$137.28 per month, consisting of \$99.84 for the widow and \$37.44 for the child. Letter from Bureau of Employees' Compensation, dated April 7, 1950. (Respondent's Exhibit D-1 in evidence, R. 187-189.) When the child marries, or attains majority the widow's compensation will increase to \$112.32. Had libelant's decedent been in the military, instead of the civil service, her exclusive recovery, by reason of the rule in *Feres v. United States*, (1950) 340 U. S. 135, would have been under the military statutes by which, regardless of the rank of the decedent, a wife and one child receives \$78.00 per month. See *infra*, p. 61, fn. 23.

v. *United States*, 74 F. Supp. 754,³ wherein the court said: “* * * I feel that only actual acceptance of compensation under this Act extinguishes the remedy sought here.” Libelant did not accept compensation and is entitled to enforce her rights against the United States under the Public Vessels Act.

Judgment was accordingly entered against the United States and this appeal followed.

SPECIFICATIONS OF ERROR

1. The District Court erred in holding that the libel stated a cause of action in respect of which the United States had consented to be sued under the Public Vessels and Suits in Admiralty Acts.

2. The District Court erred in failing to hold that, in the absence of explicit statutory direction for double recovery or election, libelant had no right of action against the United States but had her exclusive rights under the compensation, leave and retirement statutes applicable to the decedent.

3. The District Court erred in failing to hold that libelant's conduct in procuring an award of compensation and burial expenses and the issuance of checks therefor precluded her from maintaining the libel.

SUMMARY OF ARGUMENT

Introduction.—This case and its companions, No. 13054, *Allen v. United States*, and No. 13057, *Gibbs v.*

³ (E. D. Pa., 1947). Subsequent to the decision below the *Mandel* case was reversed by the Third Circuit on August 16, 1951, which thus joined the majority of four circuits rejecting the view of the *Marine* case.

United States, present for this Court's decision a common question of great importance for the United States where death or injury of government personnel occurs in the performance of duty. Claimants on account of the death or injury of government personnel have two remedies, one by suit, the other by claim for compensation. The question is whether compensation, when available, precludes recovery by suit. The question is of great importance for the national security. But Congress and the Supreme Court have left it in a number of situations to judicial determination.

Congress by the Public Vessels, Suits in Admiralty and Tort Claims Acts, has provided a judicial remedy for suit on all types of claims for death or injury in circumstances where a private party would be liable. But the majority of courts have held, correctly we believe, that the existence of these two remedies, one judicial, by suit against the United States, the other administrative, by claim for compensation benefits, does not create or recognize a right of action for death or injury of government personnel in the performance of duty in the absence of explicit statutory direction for double recovery or election. Thus, although claimants have two *remedies*, their sole *recovery* is under the applicable compensation statutes. *Mandel v. United States*, (3d Cir.) decided August 16, 1951; *Lewis v. United States*, (D. C. Cir., 1951) 190 F. 2d 22; *Johansen v. United States*, (2d Cir.) decided July 30, 1951; *Posey v. United States*, (5th Cir., 1937) 93 F. 2d 726. This view has been rejected only by the

Fourth Circuit. *United States v. Marine*, (4th Cir., 1936) 155 F. 2d 456, followed in *Johnson v. United States*, (4th Cir., 1950) 186 F. 2d 120; see also *Mandel v. United States*, (E. D. Pa., 1947) 74 F. Supp. 754, reversed (3d Cir.) August 16, 1951. In *Feres v. United States*, (1950) 340 U. S. 135, the Supreme Court applied the majority view to military service employees. The question of whether the same result should be reached in the case of civil employees, has not yet been decided by the Supreme Court.

The Government believes that, in addition to the absence of any right of action for death or injury of government employees in the performance of duty, in the present cases the United States has two additional defenses—the fellow servant rule and claimant's preclusion by obtaining awards or medical services under the compensation act. However, in view of the importance to the United States of the broader question of whether recovery by suit may be had for service-incident death or injury of government personnel, this brief, while not abandoning these two additional defenses, will be directed primarily to the contention that this Court should follow the majority rule of the *Mandel*, *Lewis*, *Johansen* and *Posey* cases, rather than the contrary view of the Fourth Circuit in the *Marine* and *Johnson* cases.

I. The Courts of Appeals for four circuits have held that absent explicit statutory direction for double recovery or election there is no right of action for death or injury of government personnel in the performance of duty and the rights under whatever stat-

utory scheme of compensation, leave and retirement benefits which may apply are exclusive. This view of the matter was applied to military service employees by the Supreme Court in *Feres v. United States*, (1950) 340 U. S. 135. It has been equally applied to civilian employees by the Courts of Appeals for the Second, Third, Fifth, and District of Columbia Circuits. *Johansen v. United States*, (2d Cir., decided July 30, 1951); *Mandel v. United States*, (3d Cir., decided August 16, 1951, reversing (E. D. Pa., 1947) 74 F. Supp. 754); *Posey v. United States*, (5th Cir., 1937) 93 F. 2d 726; *Lewis v. United States*, (D. C. Cir., 1951) 190 F. 2d 22.

The crux of the problem, as pointed out by Mr. Justice Jackson in *Feres v. United States*, *supra*, 340 U. S. at 144, is that in the absence of any provision by Congress it is equally possible that the claimant (a) may enjoy both recovery of compensation and of damages, or (b) may elect which to pursue, thereby waiving the other, or (c) may pursue both, crediting the larger liability with the proceeds of the smaller recovery, or (d) may enjoy only the right to compensation, leave and retirement, the existence of which precludes recovery in the exercise of the other remedy. In the words of Justice Jackson in *Feres* (340 U. S. at 144): "There is as much statutory authority for one as for another of these conclusions. If Congress had contemplated that this Tort Act would be held to apply in cases of this kind it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other. The absence of

any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery.”

II. There is no question but that Congress by the Public Vessels, Suits in Admiralty, and Tort Claims Acts has given a judicial remedy for death and injury of all kinds, including service-incident death and injury of civil and military personnel of the United States. But as Justice Jackson pointed out in the *Feres* case (340 U. S. at 140) the grant of jurisdiction generally to render judgment upon all such claims does not mean that a cause of action is recognized or created. It does not say that all such claims must be allowed. “Jurisdiction is necessary to deny a claim on its merits as matter of law as much as to adjudge that liability exists.” It has long been settled “that no court would be justified in interpreting a grant of jurisdiction as creating a new cause of action against, or imposing a new liability upon, the United States unless the language of the act was clearly susceptible of no other reasonable construction.” *Kuhnert v. United States*, (8th Cir., 1942) 127 F. 2d 824, 826.

This Court in *Thomason v. United States*, (9th Cir., 1949) 184 F. 2d 105; and *United States v. Loyola*, (9th Cir., 1947) 161 F. 2d 126, correctly in our view, held that the district court had jurisdiction under the Public Vessels Act of suits for wages and maintenance, but that the libelants in the respective cases had no causes of action against the United States. On the other hand, cases like *O’Neal v.*

United States, (E. D. N. Y., 1925) 11 F. 2d 869, *aff'd* (2d Cir., 1926) 11 F. 2d 871, in which the courts appear to place dismissal of suits by those entitled to compensation upon want of jurisdiction, rather than the lack of a right of action, are equally valid. Courts have only a limited jurisdiction of suits against the United States and therefore often say that there is no *jurisdiction* of libelant's claim when what they mean is that the claim does not constitute a *right of action* in respect of which the United States has consented to be liable. As Mr. Justice Holmes long ago observed, where the courts have only a limited jurisdiction, if there is no right of action for the claim, it is of a kind that the court not only ought not to enforce but has been granted no power to enforce. *The Ira M. Hedges*, (1910) 218 U. S. 264, 270. Thus, whether the opinions say that libelant has no right of action or is precluded from suit, and therefore dismiss on the merits, or say that there is no jurisdiction and dismiss solely on that ground, all the cases equally support the view that in the silence of Congress the exclusive rights for service-incident death or injury of civilian and military employees of the United States alike is under the applicable compensation, leave and retirement statutes.

III. The plain language of the compensation act as originally enacted in 1916 clearly contemplates that compensation is compulsory and exclusive and no change was made by the 1949 declaratory amendment. In enacting the Federal Employees' Compensation Act of 1916, as in enacting the Public Vessels

and Tort Claims Acts, great emphasis was placed on relieving Congress of the heavy burden of private relief legislation. While no jurisdictional remedy was then available to a Government employee to assert a right of action against the United States, if he had one, the language employed by the draftsmen of the compensation act shows the recovery of compensation was intended to be exclusive. The act provided in section 1 that the United States “*shall* pay compensation for disability and death of an employee resulting from a personal injury sustained in the performance of duty.” No election by the employee nor any choice by the Government is provided. Moreover, in section 7 it is provided that, except for earned wages and military pensions, the liability for compensation is exclusive of “any salary, pay, or remuneration whatsoever.” The intention is thus stated in plain language that compensation is compulsory and exclusive of any other right against the United States on account of death or injury in the performance of duty.

Both the Second Circuit in *Feres v. United States*, (2d Cir., 1949) 177 F. 2d 535, aff’d 340 U. S. 135, and the Supreme Court in *Dahn v. Davis*, (1922) 258 U. S. 421, have read the language of the 1916 act as declaring that compensation is exclusive. In *Feres* the claimant argued that the omission of any exception denying a judicial remedy where there was a right of compensation showed that the grant of a remedy recognized or created a right of action. The Second Circuit rejected this view observing that the language

of Section 7 plainly excluded any other right of recovery and “consequently, it would seem that the explanation for the omission * * * is that it was considered unnecessary” (177 F. 2d at 537). In so holding, the Second Circuit merely followed the earlier decision of the Supreme Court in the *Dahn* case where it was held that while there were two *remedies*, one by suit for tort, the other by claim for compensation, the sole *recovery* was under the compensation act. As the Supreme Court observed (258 U. S. at 429), “it would be difficult to frame a clearer declaration than this that no payment would be made by the Government for injury other than as provided in the act” and it characterized the language of the whole act as evidencing (p. 430) “the disposition to treat the compensation provided for as adequate for the injury received.”

Adoption of the 1949 declaratory amendment did not alter the preexisting exclusiveness of the 1916 Act. The new language relating to exclusiveness which the amendment added in section 7 (b) was purely declaratory. War Shipping Administration/Maritime Commission merchant vessel seamen already were allowed recovery only by suit and expressly excluded from compensation by decisions of the Comptroller General and by the Clarification Act of 1943. Ever since 1916, Army and Navy public vessel seamen, on the other hand, had been given compensation and had never, until *Mandel v. United States*, (E. D. Pa., 1947) 74 F. Supp. 754,

(since reversed 3d Cir., decided August 16, 1951), been allowed to recover by suit. The Senate report on the legislation made it plain that the provision for exclusiveness was merely declaratory of existing law. But the seamen's unions were troubled by the possibility that the amendment might somehow change the status of seamen. Accordingly, a precautionary proviso was added making it specific that no modification of existing law was intended. The Senate floor discussion of the proviso confirms this purpose. Senator Douglas, in charge of the bill, expressly stated that Congress was not "seeking to legislate affirmatively" and did not intend, without hearing the representatives of the Army and Navy, to make any change in the existing law or affirmatively adopt the subsequently reversed view of the district court in the *Mandel* case. It results that no modification has been made in the original 1916 law, as declared by the Second Circuit in *Feres*, and by the Supreme Court in *Dahn*, that where compensation is available for service-incident death or injury, it is exclusive of any right of recovery by suit against the United States under whatever jurisdictional act provides the judicial remedy.

IV. Unless compensation is exclusive where available difficulties in respect of double recovery or election must result. Thus the omission of Congress to make any express provision to resolve such difficulties confirms the view of the Second Circuit in *Feres v. United States*, 177 F. 2d 535, and of the Supreme Court in *Dahn v. Davis*, 258 U. S. 421, 430,

that read together as a whole the various provisions of the Federal Employees' Compensation Act "emphasized the disposition to treat the compensation provided for as adequate for the injuries received and they negative any intention on the part of the Government to make further payments." The Supreme Court in *Feres v. United States*, 340 U. S. 135, gave controlling weight to this absence of express statutory direction for the resolution of the problem. The Court concluded that if Congress had contemplated that the United States would be held liable "it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other." Accordingly, it held that "the absence of any such adjustment is persuasive that there was no awareness that the act might be interpreted to permit recovery" for service-incident injuries. The identity of the problem, whether civilian or military service employees are involved and the fact that, where military reservists on temporary active duty are concerned, the employee is given the right to elect between the military and the more favorable civilian compensation system, confirms the necessity for the same solution as to all types of employees.

The dispositive character of the silence of Congress on the point is fully demonstrated when cases trying to apply "election" are examined. Where crew members are involved, "election" is entirely unworkable. Seamen are a privileged class as wards of the admiralty judges. In line with their privileged status it has been held that even collection of cash

benefits does not preclude a seaman from recovery by suit. *Johnson v. United States*, (4th Cir., 1950) 186 F. 2d 120; cf. *Bay State Dredging Company v. Porter*, (1st Cir., 1946) 153 F. 2d 827. The court below, however, has held to the contrary, *Wright v. United States*, (N. D. Calif., 1950) 95 F. Supp. 77, accord *Johansen v. United States*, (S. D. N. Y.) 1951 A. M. C. 117. Where shoreside employees are involved some courts have held that applying for any type of benefit operates to preclude the maintenance of suit. Other courts, including the court below, have taken a contrary position holding that even receiving payment under an award is not an "election." This divergence of views, we submit, confirms the practical correctness of the Supreme Court's statement in *Feres, supra*, that since "there is as much statutory authority for one as for another of these conclusions" the absence of any congressional direction "is persuasive that there was no awareness that the act might be interpreted to permit recovery."

We therefore submit that decision here as in the cases of *Johansen v. United States*, (2d Cir., decided July 30, 1951) *Mandel v. United States*, (3d Cir., decided August 16, 1951) and *Lewis v. United States*, (D. C. Cir., 1951) 190 F. 2d 22, should be based primarily upon the ground that, absent explicit statutory direction for double recovery or election, the rights under whatever system of compensation, leave and retirement benefits may be applicable is exclusive of any right of action against the United States in the exercise of whatever judicial remedy is available.

ARGUMENT

Introduction

The present case (No. 12,906) and its companion cases No. 13,054, *Allen v. United States*, and No. 13,057, *Gibbs v. United States*, present a common question of great general importance for the United States where death or injury of government personnel occurs in the performance of duty. Claimants on account of the death or injury of government personnel have two remedies—one a judicial remedy by suit under the Public Vessels, Suits in Admiralty or Tort Claims Acts, the other by claim for compensation under whatever statute applies to the particular employee, civil or military, who is involved. The question is whether compensation, when available, precludes recovery by suit.

This Court must thus decide whether to follow the minority view of the Fourth Circuit, adopted by the court below, that where civil rather than military employees are involved, the right to compensation is not preclusive of recovery against the United States by suit (*United States v. Marine*, (4th Cir., 1946) 155 F. 2d 456; *Johnson v. United States*, (4th Cir., 1950) 186 F. 2d 120; *Mandel v. United States*, (E. D. Pa., 1947) 74 F. Supp. 754, reversed, 3d Cir., August 16, 1951) or whether to follow the majority rule that in the absence of any explicit statutory direction for double recovery or election there is no right of action against the United States for service-incident death or injury of government personnel and the sole right of recovery is under whatever compensation,

leave and retirement statutes are applicable (*Mandel v. United States*, (3d Cir.) decided August 16, 1951, reversing (E. D. Pa., 1947) 74 F. Supp. 754; *Lewis v. United States*, (D. C. Cir.) 190 F. 2d 22; *Johansen v. United States*, (2d Cir.) decided July 30, 1951; *Posey v. United States*, (5th Cir., 1937) 93 F. 2d 726).

The importance to the United States of this question of whether recovery by suit may be had for service-incident death and injury of civil as well as military personnel of the Army and Navy and of other security sensitive agencies extends far beyond the amount of the recovery and the nature of the forum in this or any other case. The manner of the deaths and injuries in the present cases appears to involve no matter of the functioning of defense installations on Army and Navy craft nor of the military decisions of the superiors of the Army and Navy personnel involved. But in many instances such matters are involved and in times of emergency the security of the nation imperatively requires that the manner and occasion of the service-incident death or injury of such employees, whether in the civil or the military service, be not litigated in the courts. The Supreme Court in *Feres v. United States*, (1950) 340 U. S. 135, already has held compensation exclusive where military employees are involved. But it is obvious that it is equally dangerous to litigate the correctness of the acts of their military superiors and the proper functioning of the defense installations involved whether the death or injury is that of a

civil or a military employee. And Congress, as yet, has only seen fit to redeclare the exclusiveness of compensation in respect of those civil employees who (a) are covered by the Federal Employees' Compensation Act, (b) are employed in shore-side positions, and (c) are injured after the enactment of the amendments of October 14, 1949. Thus, the right of recovery (1) of the civilian component of the crews of public vessels, (2) of the many civil employees covered by special compensation, leave and retirement systems other than the Federal Employees' Compensation Act, and (3) of all employees who, like those here, were injured before October 14, 1949, has, in effect, been reserved for final judicial consideration, eventually by the Supreme Court.

By the Tort Claims Act (28 U. S. C. 1346 (b)) and the Public Vessels and Suits in Admiralty Acts (46 U. S. C. 781-789, 741-752), Congress has provided jurisdiction for suit on all types of claims for death or injury. A judicial remedy thus exists for all claims for death or injury of government employees and recovery may be had by suit provided only that a right of action has been recognized or created. This Court, correctly in our view, held in *Thomason v. United States*, 184 F. 2d 105, and *United States v. Loyola*, 161 F. 2d 126, that the general grant of a remedy by the Public Vessels Act of suits "for damages caused by a public vessel" extends to all suits for damages, including those for death or injury and for wages and maintenance. It is the Government's position that the majority view is correct and that absent explicit statutory provision

for double recovery or election, no right of action has been created for service-incident death or injury of government personnel and thus, although the claimant has two *remedies*, only the compensation remedy can lead to any *recovery*.

The Government believes, however, that in addition to the absence of any right of action for death or injury of government personnel in the performance of duty, the United States has in the three cases now before this Court two additional defenses—(1) that the injuries sued for were due to the wrongful acts of fellow servants, and (2) that libelants by claiming awards or medical services under the Compensation Act are precluded from recovery.

The fellow servant rule appears fully dispositive of the present *Vatuone* case (No. 12,906) and of the *Gibbs* case (No. 13,057). In *Allen* (No. 13,034), however, appellant was a member of a crew and so immunized against the fellow servant rule by the Jones Act (46 U. S. C. 688). *Vatuone* and *Gibbs* were ship repairmen, however, and not crew members or longshoremen subject to that Act. A scrutiny of the Longshoremen's and Harborworkers Compensation Act (33 U. S. C. 905) and of the Federal Employers' Liability Act (45 U. S. C. 51, et seq.), made applicable to seamen by the Jones Act, makes it apparent that the fellow servant defense is abrogated only as to those employees covered by such Acts. The statutes abolishing the fellow servant rule are limited by the object of the legislation to those employers who are required to furnish compensation

or who are carriers; the abolition does not reach to employees who are beyond the ambit of the act. See e. g., *Price v. Railway Express Agency*, (1948) 322 Mass. 476, 479, 78 N. E. 2d 13, 16; *Southern Ry. Co. v. Taylor*, (D. C. Cir., 1926) 16 F. 2d 517, 522. It is settled that employers of personnel not included in the operation of such acts can avail themselves of the fellow servant defense. Thus Section 5 of the Harborworkers Act (33 U. S. C. 905), denying employers the benefit of the fellow servant defense for failure to secure compensation payments, does not apply because Section 3 (2) of that Act (33 U. S. C. 903) excludes employees of the United States from its coverage. Nor does state legislation abrogating the fellow servant defense apply. First, state law could not alter the uniformity of the maritime law which, except as altered by the Jones Act and the Harborworkers Act, applies the fellow servant rule.⁴ And, second, in no event could state legislation alter or affect the employer-employee relationship established by federal law between the United States and its employees.⁵

The rule of preclusion by election appears equally dispositive of all three cases. In the *Vatuone* case

⁴ *Hammond Lumber Co. v. Sandin*, (9th Cir., 1927) 17 F. 2d 760, cert. den. 274 U. S. 756; *Carstensen v. Hammond Lumber Co.*, (9th Cir., 1926) 11 F. 2d 142; *Western Fuel Co. v. Garcia*, (9th Cir., 1919) 260 Fed. 839; *The Hoquiam*, (9th Cir., 1918) 253 Fed. 627; *Mallory SS Co. v. Simmons*, (5th Cir., 1924) 2 F. 2d 970. Boynton, "The Fellow Servant Rule in Admiralty," (1926) 1 Wash. L. Rev. 195.

⁵ *United States v. Standard Oil Co.*, (1947) 332 U. S. 301, 305-311.

the widow of an Army ship repairman filed claim for compensation for the death of her husband in the performance of duty, obtained an award and received checks thereunder. She could not by purporting to withdraw her claim, revoke her election. In the *Gibbs* case a Navy ship repairman injured in the performance of duty lost no pay, by reason of his rights to sick and annual leave, and suffered no loss of use of member or disfigurement so as to be entitled to schedule benefits, but accepted medical treatment as a beneficiary of the Compensation Act. In the *Allen* case a member of the civilian component of an Army Transport crew developed tuberculosis during the performance of duty, procured an award of compensation and is still collecting payments thereunder.

In our view each of these three libelants is precluded from litigating the broader question of whether, absent express statutory authorization for double recovery or election, their rights under the applicable compensation, leave and retirement statutes constitute their sole recovery for death or injury in the performance of duty. For the reasons more fully developed in Point IV of this brief (*infra*, pp. 61-64) we believe that "an election to take compensation under the statute as evidenced by bringing proceedings to secure compensation, even though compensation is denied, or the right thereto is disputed, or by accepting compensation or medical services * * * bars an action to recover damages" (71 Corp. Jur., p. 1488). Except for the decision of the court below,

and the decision of the Fourth Circuit in *Johnson v. United States*, (4th Cir., 1950) 186 F. 2d 120, together with the dissenting opinion of Judge Frank in the *Johansen* case, applying a different rule to seamen because of their privileged status as wards of the admiralty judges, federal courts have uniformly held that claiming compensation precludes recovery by suit. See esp. *Hines v. Dahn*, (8th Cir., 1920) 267 Fed. 105, 114, quoted, *infra*, p. 48, fn. 16.

If the Government is correct, however, that the right to compensation, leave and retirement pay provides the sole recovery and there is no cause of action for service-incident death or injury of both civil and military employees alike, this Court, like those for the Second and Third Circuits in the *Johansen* and *Mandel* cases, need not reach the "election" question of whether libelants are precluded by claiming payments or medical services under the Compensation Act. We believe that an open-minded examination of the consequences of litigating the manner and cause of service-incident deaths and injuries, of the legislative history of the problem, and of the reasons given by the several courts for their divergent views, leaves no doubt that the majority view is correct and that absent an express statutory direction for double recovery or election the sole recovery for the death or injury of government employees in the performance of duty is under the particular compensation, leave and retirement statutes which apply.

We emphasize again that this question of the exclusiveness of compensation, leave, and retirement pay, as pointed out in the beginning, cannot involve any possible doubt as to the unquestioned existence of a jurisdictional remedy for death or injury and for seamen's wages or maintenance under the Public Vessels Act. The existence of such jurisdiction for death or injury was affirmed in *Dobson v. United States*, (2d Cir., 1928) 27 F. 2d 807, 808, cert. den. 278 U. S. 653, and has been followed ever since. *New England Maritime Co. v. United States*, (D. Mass., 1932) 55 F. 2d 674, 685, affirmed per curiam (1st Cir., 1934) 73 F. 2d 1016; *Canadian Aviator, Ltd. v. United States*, (1945) 324 U. S. 215. This Court, in line with the Government's views has extended its jurisdiction to seamen's wages and maintenance. *Thomason v. United States*, (9th Cir., 1950) 184 F. 2d 105; *United States v. Loyola*, (9th Cir., 1947) 161 F. 2d 126. But the grant of a judicial remedy does not mean that a right of recovery in the exercise of that jurisdiction was also created. Indeed it seems probable that, in view of the familiar general rule that "unless the act is by its terms optional, remedies provided by the act are exclusive when the act is applicable,"⁶ Congress expected that section 9 of the Public Vessels Act (46 U. S. C. 789), would be interpreted in accordance with its literal language as limiting the liability of the United States in suits

⁶ *Mandel v. United States*, (3d Cir., 1951) — F. 2d —, —, reversing 74 F. Supp. 754; see 71 Corp. Jur., p. 1480; Prosser, *Torts*, (1941) p. 543; Schneider, *Workmen's Compensation Law*, (1941) § 147, p. 421, *passim* §§ 89–154.

brought under the jurisdictional grant to that of private employers similarly situated—and therefore as precluding recovery for service-incident death or injury since compensation was applicable.

In any event, as Justice Jackson observed concerning the problem in *Feres v. United States*, (1950) 340 U. S. 135, 140–141, the granting of a remedy by suit does not mean that recovery may be had. Jurisdiction is conferred to render judgment upon all claims for death or injury—

* * * But it does not say that all claims must be allowed. Jurisdiction is necessary to deny a claim on its merits as matter of law as much as to adjudge that liability exists. We interpret this language to mean all it says, but no more. Jurisdiction of the defendant now exists where the defendant was immune from suit before; it remains for courts, in exercise of their jurisdiction, to determine whether any claim is recognizable in law.

For, as the court said in *Kuhnert v. United States*, (8th Cir., 1942) 127 F. 2d 824, 826, “We think that no court would be justified in interpreting an act of Congress as creating a new cause of action against, or imposing a new liability upon the United States unless the language of the act was clearly susceptible of no other reasonable construction.” See also *Atchley v. Tennessee Valley Authority*, (N. D. Ala., 1947) 69 F. Supp. 952, 954.

We believe, therefore, that the admitted grant of a judicial remedy is not conclusive of the right of double recovery or election, but that, on the contrary,

if Congress had contemplated that the Public Vessels, Suits in Admiralty, and Tort Claims Acts would be held to apply to government personnel injured in the performance of duty, it would not have omitted any provision for adjusting the recovery. "The absence of any such adjustment is persuasive that there was no awareness that the act might be interpreted to permit recovery * * *" *Feres v. United States, supra*, 340 U. S. at 144.

I

Libelant has two remedies against the United States, but the decisions of four circuits establish that libelant's compensation rights preclude recovery by the exercise of the judicial remedy

The Government believes that absent an explicit Congressional direction for double recovery or election, the rights of government personnel under whatever compensation, leave and retirement statutes apply to employees of their particular class⁷ are exclusive and preclude the creation of any cause of action for their injury or death in the per-

⁷ In the Federal Employees' Compensation Act the inseparable interconnection of compensation, leave and retirement is particularly emphasized by the express provisions respecting the employees' right of election among the three. See respecting leave rights 5 U. S. C. 758; respecting retirement rights 5 U. S. C. 714. The connected character of compensation, leave and retirement is further emphasized by the provisions for military reservists on temporary active duty to elect between their rights under the military statutes and the FECA. See 5 U. S. C. 797-800; 10 U. S. C. 1711; 14 U. S. C. 311-312, 386; 34 U. S. C. 855 (c), 857 (e); 50 U. S. C. 1511.

formance of duty despite the existence of a judicial remedy for its enforcement if there were a cause of action. This view of the matter, applied to military service employees by the Supreme Court in *Feres v. United States*, (1950) 340 U. S. 135, has been applied equally to civil-service employees by the Courts of Appeals for the Second, Third, Fifth, and District of Columbia Circuits. *Mandel v. United States*, (3d Cir., decided August 16, 1951); *Johansen v. United States*, (2d Cir., decided July 30, 1951); *Lewis v. United States*, (D. C. Cir., 1951) 190 F. 2d 22; *Posey v. United States*, (5th Cir., 1937) 93 F. 2d 726. The Fourth Circuit alone has explicitly held the contrary. *United States v. Marine*, (4th Cir., 1946) 155 F. 2d 456, followed in *Johnson v. United States*, (4th Cir., 1950) 186 F. 2d 120.

In *Mandel v. United States*, the Third Circuit, in a case like the present involving an army employee, was asked to follow the Fourth Circuit and apply a different rule where civil rather than military service employees of the United States were involved.⁸ The

⁸ The trial court in *Mandel v. United States*, (E. D. Pa., 1947) 74 F. Supp. 754, 755, had said, "Although for reasons peculiar to their status, members of the armed forces should be excluded from the waiver of sovereign immunity, a seaman's remedies should not vary with the nature of the vessel upon which he is employed by the Government." It refused to find significance in the variation in the remedy which Congress had commanded in distinguishing between public-vessel civilian seamen, who are entitled to compensation, on the one hand, and private and WSA merchant seamen whom Congress, ratifying the previous decisions of the Comptroller General, has expressly excluded from compensation, on the other.

Court agreed with the Government in following Mr. Justice Jackson's pronouncement in *Feres v. United States*, (1950) 340 U. S. 135, 141, that the undoubted grant of a remedy under the various jurisdictional acts for claims for injury or death of every type of person does not without more, mean that Congress has created a cause of action against the United States for the injury or death of government personnel in the performance of duty. Judge Goodrich said (slip op. pp. 4-6) :

We are necessarily faced then with the general problem: May an injured person who is eligible to compensation claim additional rights against the United States? If so, we assume an action to enforce them could be maintained by the administrator of the decedent for the damages caused by his death. 46 U. S. C. A. § 761. We think there are several reasons why the Compensation Act should be held to be the exclusive measure of rights in this case.

1. The first reason is the analogy to the rule under Workmen's Compensation Acts which are now an accepted and almost universal part of state legislation. It is the general rule that unless the act is by its terms optional, remedies provided by the act are exclusive when the act is applicable, at least so far as rights against the employer are concerned. One must not generalize too widely from this rule because many of the statutes provide expressly that the remedy is exclusive. Nevertheless, we think the general rule represents the crystallization of the thought of both lawmakers and courts upon the subject. The Compensation Acts are in-

tended to provide a more humane, adequate and generally fair method of dealing with accidents incurred by employees in the course of employment than the former common-law rules of employers' liability. They are intended to do away with prolonged and expensive litigation with hard cases going uncompensated because of inability to show fault on the part of the employer. We think that in general the natural inference would be that the Compensation Act represents the substitution of a more enlightened form of remedy for industrial accidents than the ordinary tort action for damages.

2. The reliance on the Compensation Act alone will remove an element of unfairness otherwise present in the type of case represented here. * * * Those members of the armed forces injured while on active duty have such compensation and only such compensation as Congress has provided by the military pension and compensation laws. We think discrimination in favor of a civilian employee would be unfortunate unless such discrimination is expressly forced upon us by legislative mandate. It would also discriminate against civilian seamen employed by the United States through the War Shipping Administration who are authorized to sue the United States for the tort but are excluded from the FECA by the War Shipping Administration (Clarification) Act of 1943, 50 U. S. C. A. App. § 1291.

In *Lewis v. United States*, the Court of Appeals for the District of Columbia Circuit, in a case involving a civilian park policeman, a civil service employee of the Interior Department, likewise refused to follow

the Fourth Circuit and draw a distinction between civil and military service employees or between employees under different systems of compensation, leave and retirement statutes. The District of Columbia Circuit referred to the fact that the compensation act applicable to the plaintiff in *Lewis* contained no language making it exclusive and said (190 F. 2d at pp. 22, 23, 24) :

The question of the Government's liability in tort has received a definitive answer with respect to the great body of Federal employees. They are covered by the Federal Employees' Compensation Act, which not only grants compensation benefits but also expressly forbids them from suing the Government for injuries received in the course of their duties. Congress has thus, in most instances, left no doubt as to its desire to limit Federal employees to their remedy under the Compensation Act and to preclude double recovery or an election of remedies. * * * [But] we think that whether or not the Act is applicable to appellant, this suit cannot be maintained.

* * * * *

The Supreme Court has recently had occasion to pass upon a case somewhat similar to the one now before us, a suit brought under the Federal Tort Claims Act by a member of the armed services injured on active duty through the negligence of another soldier, *Feres v. United States*, 340 U. S. 135. In concluding that such suits were not maintainable, Mr. Justice Jackson had this to say, among other things:

“The primary purpose of the Act was to extend a remedy to those who had been without; if it incidentally benefited those already well provided for, it appears to have been unintentional. Congress was suffering from no plague of private bills on the behalf of military and naval personnel, because a comprehensive system of relief had been authorized for them and their dependents by statute.”⁹

* * * * *

“This Court, in deciding claims for wrongs incident to service under the Tort Claims Act, cannot escape attributing some bearing upon it to enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in armed services.” (340 U. S. at 140, 141–42, 144.)

By parity of reasoning we think the same result must be reached in this case. Like the soldier in the *Feres* case, the Park Policeman obtains the benefit of “systems of simple, certain, and uniform compensation for injuries or death.” Members of the Park Police are by congressional enactment entitled “to all the benefits of relief and retirement” furnished by the “Policemen’s and Firemen’s Relief Fund, District of Columbia.” That “statutory scheme contemplates a broad system of relief by way

⁹ The District of Columbia Circuit might also have quoted in this connection the further passage from Supreme Court’s opinion in *Feres*, that: “We cannot ignore the fact that most states have abolished the common law action for damages between employer and employee and superseded it with workmen’s compensation statutes which provide, in most instances, the sole basis of liability.” (340 U. S. at 143.)

of medical and hospital care and treatments, pensions, retirement. * * *” As was said in the *Feres* case, “If Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other.” 340 U. S. 135, 144. * * * And in view of the general policy of Congress not to permit Federal employees to recover under the Tort Claims Act for injury at work, it certainly would seem unwarranted to permit members of the Park Police—uniquely among Federal employees—to maintain suits for damages, since the nature of their work and the benefits they receive suggest the contrary result. See *Dahn v. Davis*, 258 U. S. 421, 432; *Dobson v. United States*, 27 F. 2d 807.

Congress is the body which must ultimately pass on the question of the amount and sufficiency of the benefits to be received by the Park Police, or by any other group of Federal employees. Congress annually appropriates for their salaries and for the amounts to be contributed by the Federal Government under legislation providing for retirement pay and compensation for injuries. Congress can increase or reduce these amounts. It can grant new gratuities through private bill or general legislation. And “if we misinterpret the Act, at least Congress possesses a ready remedy.” *Feres v. United States*, *supra*, at p. 138.

So in *Johansen v. United States*, the Second Circuit likewise rejected the Fourth Circuit view and held

that, without express statutory authorization for double recovery or election, no government employee, whether in the civil or the military service could recover by suit but all were equally precluded because they had no cause of action for injury in the performance of duty. The court said (slip op. pp. 1763-4):

We need not decide whether the appellant is disabled from bringing this suit by an election to accept a compensation award; since, the government not having consented to be sued, that was his only remedy.

* * * This case falls within the category to which *Bradey v. United States*, 2 Cir., 151 F. 2d 742, cert. denied 326 U. S. 795, belongs. We there held, following *Dobson v. United States*, 2 Cir., 27 F. 2d 807, cert. denied 278 U. S. 653, that a naval enlistee serving as a member of the crew of a public vessel was not permitted by the Public Vessels Act to sue the government for personal injuries received in line of duty, and that such injuries were compensable only under the special provisions of law applicable to naval personnel. * * * Similarly, in *Feres v. United States*, 2 Cir., 177 F. 2d 535, aff'd 340 U. S. 135, we held that an employee entitled to compensation as a member of the armed forces was precluded by that right from maintaining suit against the government under the Tort Claims Act for injuries received in line of duty.

Since the appellant would have been limited to suit if he had been employed aboard a merchant vessel of the United States, and to compensation if a member of the military serv-

ice, allowing him but one means of recovery will appropriately fit "into the entire statutory system of remedies against the Government to make a workable, consistent, and equitable whole." *Feres v. United States*, 340 U. S. 135, 139.

Earlier in *Bradley v. United States*, (2d Cir., 1945) 151 Fed. 742, cert. den. 326 U. S. 795, the Second Circuit had held that the necessity of the War Shipping Administration (Clarification) Act confirmed this view that civil and military employees were precluded alike from suit by the absence of any cause of action. There the court had said (151 F. 2d at 743):

This appears to us to show that Congress did not expect those in its service upon "public vessels" to enjoy at once the privilege of employees' compensation and the right to recover damages for the same injuries. The compensation provided for the Navy is indeed not the same as that provided under the United States Employees' Compensation Act, 5 U. S. C. A. § 751 et seq.; but that makes no difference. We are to assume that each is deemed adequate for the occasion; particularly since it is certain, and does not depend upon proof of fault. We conclude that Congress regards the two remedies as mutually exclusive; and the decree will be affirmed.

And, still earlier, the Fifth Circuit in *Posey v. Tennessee Valley Authority*, (5th Cir., 1938) 93 F. 2d 726, 728, had said:

* * * This compensation is the sole remedy ordinarily available to an injured employee

of the United States because of the general refusal to permit suits for torts. It is not a gratuity or grace, but a measured justice operating on the same general basis as state compensation laws. We entertain no doubt that Congress can limit the remedy of injured employees of its instrumentality to this compensation. We have but little doubt that it so intended. The inconvenience, uncertainty, and consequent litigation that would at once arise if the laws of each state in which the employee might work should apply must have been foreseen. * * * ¹⁰

Despite the minority view of the Fourth Circuit, we believe the crux of the problem is that every indication points toward the absence of any Congressional intention to create a new cause of action in addition to the various systems of compensation, leave and retirement statutes which apply to the different groups of civil and military employees. In short, as stated by Justice Jackson in *Feres v. United States*, (1950) 340 U. S. 135, 144:

This Court, in deciding claims for wrongs incident to service under the Tort Claims Act, cannot escape attributing some bearing upon it to enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in armed services. We might say that the claimant may (a) enjoy both types of recovery, or (b) elect which to pursue, thereby waiving the other, or (c) pursue both, crediting the larger liability

¹⁰ Accord, *Humphrey v. Poss*, (1943) 245 Ala. 11, 15 So. 2d 732; *Breeding v. T. V. A.*, (1942) 243 Ala. 240, 9 So. 2d 6.

with the proceeds of the smaller, or (d) that the compensation and pension remedy excludes the tort remedy. There is as much statutory authority for one as for another of these conclusions. If Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other. *The absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service.* [Emphasis supplied.]

We submit that this unanimity of decision by four circuits should be accepted as controlling in the three cases now at bar. It is dispositive of every contention which can be presented in these present cases. It settles that in every case, unless Congress has in express terms provided for double recovery or election, all government personnel of whatever type, and their dependents, cannot by suit against the United States recover for service-incident injury and death but are limited exclusively to their recovery under the particular compensation, leave and retirement statutes applicable to personnel of their type. However, since there have been differences of opinion in another court of appeals, the remainder of our argument will seek to emphasize the correctness of the majority holding and the absence of any reason for this Court to depart from it.

II

The grant of a judicial remedy by suit for injury and death of government employees did not create a new additional cause of action where rights already existed under applicable systems of compensation, leave and retirement statutes

There can be no question but that Congress by the Public Vessels, Suits in Admiralty and Tort Claims Acts has given a judicial remedy in the district courts for suits for injury and death of all kinds, including service-incident injury and death of government personnel. As the court observed in *Mandel*, if rights of action exist despite the availability of compensation, "we assume an action to enforce them could be maintained" (slip op. p. 4). So Justice Jackson in *Feres v. United States*, (1950) 340 U. S. 135, 141, explained that Congress had conferred jurisdiction on the courts generally to render judgment upon all claims—

* * * But it does not say that all claims must be allowed. Jurisdiction is necessary to deny a claim on its merits as matter of law as much as to adjudge that liability exists. We interpret this language to mean all it says, but no more. Jurisdiction of the defendant now exists where the defendant was immune from suit before; it remains for courts, in exercise of their jurisdiction, to determine whether any claim is recognizable in law.

Indeed, it is familiar and long settled that Congress by providing a remedy by suit against the United States does not thereby recognize or create rights of action. Thus, the court well said in *Kuhnert v.*

United States, (8th Cir., 1942) 127 F. 2d 824, 826, "We think that no court would be justified in interpreting an act of Congress as creating a new cause of action against, or imposing a new liability upon, the United States unless the language of the act was clearly susceptible of no other reasonable construction." See also *Atchley v. Tennessee Valley Authority*, (N. D. Ala., 1947) 69 F. Supp. 952, 954.

This had been the Government's view in all the "compensation cases" and explains the cases from which our opponent's attempt to draw support because they were dismissed on the merits, correctly in our view, rather than for want of jurisdiction. Thus, in *United States v. Loyola*, (9th Cir., 1947) 161 F. 2d 126, which our opponents cite as contrary to the Government's position, we argued successfully that the court had jurisdiction under the Public Vessels Act, but that libelant had no cause of action against the United States for maintenance both because he had refused government hospitalization and medical treatment and also because, although he forfeited all right to compensation payments during such refusal, still his fundamental right to compensation precluded recovery.¹¹ Thus, contrary to our opponent's view, in

¹¹ The Government's brief in *Loyola* conceded (p. 17), "despite compensation and pension acts, *jurisdiction* continues unabated under any applicable jurisdictional acts" but argued "the exclusive remedy of the compensation or pension act" still bars "recovery in a suit under the jurisdictional act." So in *Johnson v. United States*, (4th Cir., 1950) 186 F. 2d 120, the Government's brief (p. 12) stated "in cases involving injuries sustained in the performance of duty by public vessel crew members, whether they be in the military or civil service, although *jurisdiction to bring* the

Loyola this Court upheld the Government's position that libelant, having refused the medical treatment tendered by the Government, lost both his right to claim maintenance as well as his right to claim compensation. The court therefore, equally correctly in our view, had no occasion to reach the problem of whether or not libelant, having forfeited his right to receive compensation benefits, might no longer be precluded by his former right to compensation but might in the special circumstances have a right of recovery by suit.

Our consistent position, that a remedy exists under the Public Vessels Act for every kind of suit for damages but is not conclusive of the existence of a cause of action in the libelant, was expressly adopted by *Thomason v. United States*, (9th Cir., 1949) 184 F. 2d 105, and *Jentry v. United States*, (S. D. Calif., 1947) 73 F. Supp. 899, further proceedings 1951 A. M. C. 1203, as well as in the *Loyola* case, 161 F. 2d at 127. In all three cases the libelant's suits, correctly in our view, were dismissed *on the merits* for lack of any right of action, *not for want of jurisdiction*.¹²

suit exists, *recovery* cannot be had when the public vessel crew members are entitled to receive payments of compensation or pension benefits."

¹² Cf. *Thomason v. W. P. A.*, (D. Idaho, 1942) 47 F. Supp. 51, 54, aff'd (9th Cir., 1943) 138 F. 2d 343. State decisions confirm this view. The defense that compensation is applicable and exclusive is not absence of jurisdiction in the court, for the court has jurisdiction of all torts, but lack of any right of action in the plaintiff. Accordingly, unless the right to compensation appears on the face of plaintiff's pleading, the matter must be presented by plea or answer, not by demurrer, exceptions, or motion to dismiss and the

But this distinction between the absence of a cause of action and a lack of jurisdiction has been often disregarded by the courts. Indeed, many cases which were rested in part on absence of "jurisdiction" (and which the Government's opponents now contend were overruled when the Supreme Court finally settled, in accordance with every prior decision and with the statute's plain terms, that *jurisdiction* under the Public Vessels Act extends to all cases of death and injury caused by a public vessel) are explained by the obvious disregard of this distinction and, upon examination, continue to be as valid as before. On this basis cases like *O'Neal v. United States*, (E. D. N. Y., 1925) 11 F. 2d 869, aff'd (2d Cir., 1926) 11 F. 2d 871 (cf. *Haselden v. United States*, (E. D. N. Y., 1927) 24 F. 2d 529, 530, aff'd *sub nom. Dobson v. United States*, (2d Cir., 1928) 27 F. 2d 807, cert. den. 278 U. S. 653), in which dismissal seems to be placed by the court on lack of jurisdiction instead of on the merits, become easily understandable.¹³ Courts have only limited

burden is on the employer to establish the applicability of the statute to the death or injury in suit. 58 Am. Jur. p. 615; 71 Corp. Jur. pp. 1500, 1502. *Hogan v. Buja*, (E. D. La., 1920) 262 Fed. 224; *Kemper v. Gluck*, (1931) 327 Mo. 773, 39 S. W. 2d 330, cert. den. 284 U. S. 649; *Beveridge v. Illinois Fuel Co.*, (1918) 283 Ill. 31, 119 N. E. 46, 47; *Noble v. Detroit Taxicab & Trf. Co.*, (1923) 222 Mich. 414, 192 N. W. 709, 710; *Jirout v. Gebelein*, (1923) 142 Md. 692, 121 Atl. 831.

¹³ Thus, in *O'Neal*, a member of the crew of a coast guard boat, then entitled to compensation under the Federal Employees' Compensation Act, sued for injuries and the district court said (11 F. 2d 869), "To construe this act as applying to seamen injured on a government-owned vessel, it seems to me would be contrary to the well-established policy of the government, which has created the United States Employees' Compensation Commission to meet such

jurisdiction where suits against the United States are concerned, just as they have only a limited jurisdiction of suits in admiralty. Judges therefore often say there is no jurisdiction of libelant's claim when what is meant is really that the claim stated in the libel does not constitute a cause of action in respect of which suit can be maintained. Of this problem Mr. Justice Holmes long ago observed in *The Ira M. Hedges*, (1910) 218 U. S. 264, 270:

There sometimes is difficulty in distinguishing between matters going to the jurisdiction and those determining the merits. *Fauntleroy*

conditions, and provided for the payment of compensation to its injured employees. * * * Of course, it is true, as urged by libelant, that, in actions in rem against the ship for injuries received by those on board, such injuries are charged to the ship; but to my mind Congress by this enactment [the Public Vessels Act] clearly did not intend to overturn the government's established policy, and permit its employees to bring actions for damages received on government ships in the course of their employment, * * *

Cf. *Lopez v. United States*, (S. D. N. Y., 1944) 59 F. Supp. 831, where a member of the civilian component of the crew of the Army Hospital Ship *Seminole*, entitled to compensation under the Federal Employees' Compensation Act, brought suit, the Government answered he was precluded from suing by his right to compensation, libelant excepted, and the Government's answer was upheld, the court declaring (p. 832), "respondent alleges more particularly that the libelant was an employee of the United States Army Transportation Corps. If the government substantiates its first allegation, then this paragraph is proper to show that libelant is relegated to his rights under the United States Employees' Compensation Act, 5 U. S. C. A. § 751 et seq. There is no allegation in the libel that the libelant was employed by 'the United States through the War Shipping Administration,' and hence he has no cause of action against the United States under Public Law 17, 78th Congress, 50 U. S. C. A. Appendix, § 1291, his only other remedy against the government."

v. *Lum*, 210 U. S. 230, 235, and, no doubt, this case presents that difficulty. But perhaps it may be said that the two considerations coalesce here. The admiralty has a limited jurisdiction. If there are no merits in the claim it is of a kind that the admiralty not only ought not to enforce but has no power to enforce.

We believe, therefore, that whether the opinions say that libelant has "no cause of action" or is "precluded from suit," and accordingly dismiss on the merits, or whether they say that there is "no jurisdiction" and dismiss on that ground, the cases are all of equal authority against the right of recovery for service incident injury or death. All equally establish that unless Congress has in explicit statutory terms directed that there shall be double recovery or election, government personnel and their dependents cannot recover by suit for injury or death in the performance of duty but are limited to their recovery under the applicable compensation, leave and retirement acts.

III

The plain language of the Compensation Act as enacted in 1916 clearly contemplates that compensation shall be paid in every case and is exclusive; the 1949 amendments are only declaratory and made no change

Before the Federal Employees' Compensation Act of September 7, 1916, c. 458, 39 Stat. 742, no general compensation law existed for civil as contrasted with military service crew members of government vessels nor for civil employees as a class. The prior Acts of May 30, 1908, c. 236, 35 Stat. 556, and March 11,

1912, c. 57, 37 Stat. 74, applied to only certain workers in navy yards, arsenals, construction projects, and a few other especially hazardous occupations. The hearings and committee reports on the bill which became the 1916 Act constantly emphasize the absence of any right of recovery for the majority of government workers against their employer, the United States, except by means of private relief bills. Heavy emphasis was placed on the importance of relieving Congress of this burden of private legislation.¹⁴

In 1916 there was no jurisdictional remedy available to a civil service crew member or other government employee by which to assert a cause of action against the United States for tort. Moreover, if there were jurisdiction he would have been barred by the fellow servant rule. But to the extent that there could be any claim against the United States, the language employed by the draftsmen of the 1916 Act shows that compensation was to be compulsory and exclusive of any other right of action against the United States. The act provided in Section 1 that the United States “*shall* pay compensation for disability and death of an employee resulting from a personal injury sustained in the performance of duty.” The Act is mandatory on both sides. No election by the employee in accepting nor any choice by the Government about

¹⁴ 64th Cong., 1st Sess., House Judiciary Committee, Hearings on H. R. 15315 (esp. pp. 5, 11) and H. Rep. 678 (esp. p. 8). Other reports and documents relating to the compensation bills are H. Doc. 1135, 63d Cong., 2d Sess.; H. Rep. 561, 63d Cong., 2d Sess.; S. Rep. 733, 64th Cong., 1st Sess.; H. Rep. 1195, 64th Cong., 1st Sess.

paying is permitted. The Act provided in Section 7 that, except for earned wages and military pensions, the liability of the United States for compensation should be exclusive of "any salary, pay, or remuneration whatsoever." Thus, while the 1916 draftsmen may not have so written the Act as to provide against every future contention that the grant of a jurisdictional remedy against the United States impliedly recognized or created new rights of action and imposed new liabilities on the Government, the intention is clearly stated that compensation was to be exclusive of all other rights against, and every other liability of, the United States for injury or death in the performance of duty.

When originally enacted in 1916 and so far as relevant when this case arose, the full text of the pertinent sections of the Act of September 7, 1916, c. 458, 39 Stat. 742, provided:

[Sec. 1.] That the United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of duty * * *

Sec. 7. That as long as the employee is in receipt of compensation under this Act, or, if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed, and except

pensions for service in the Army or Navy of the United States.

No change relevant to the present cases has been since made, for the only amendment has no bearing upon cases involving crew members or ordinary civil employees but only on those entitled to elect between military and the more generous FECA benefits.

As might be expected, two courts have read the language itself of the 1916 Act as declaring that compensation was exclusive. The latest such declaration that, despite the existence of a remedy by suit against the United States, the 1916 Act is by its plain terms exclusive of any cause of action for damages for injury or death in the performance of duty was made by the Second Circuit in *Feres v. United States* (2d Cir., 1949), 177 F. 2d 535, aff'd 340 U. S. 135. That was a case involving the effect on recovery by a soldier of his rights to compensation, leave and retirement under the statutes applicable to government employees of the military service. The soldier contended that his compensation rights could not exclude recovery of damages at law because (like the Public Vessels and Suits in Admiralty Acts involved here) the Tort Claims Act, which provided him the jurisdictional remedy there involved, had omitted to provide any exception expressly denying its jurisdictional remedy in those cases where a right to compensation also existed. Early drafts of the bill had included such an express exception of cases where compensation under the Federal Employees' Compensation Act and the Veterans Act was available. The soldier argued that

the omission showed the grant of the judicial remedy recognized or created a right of action in the exercise of the jurisdiction. In rejecting this view, the court said (p. 537):

This exception was omitted in the Act as finally passed. However, the Federal Employees' Compensation Act, as amended, provided that as long as an employee is in receipt of compensation under that Act "he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed, and except pensions for service in the Army or Navy of the United States * * *" 5 U. S. C. A. § 757.

* * * Consequently, it would seem that the explanation for the omission of the thirteenth exception to the Tort Claims Act is that it was considered unnecessary.¹⁵

Admittedly this declaration by the Second Circuit that the Federal Employees' Compensation Act is exclusive by its own terms despite the existence of a judicial remedy is only dictum. But, we submit, it was well considered, was very closely related to the matter decided and only followed the earlier declaration by

¹⁵ In fact the Admiralty and Shipping Section of the Department of Justice had made strong representations against the exception. No such exception existed in the Public Vessels and Suits in Admiralty Acts and it was feared that its insertion in the Tort Claims Act might lead to the overruling of *Lopez v. United States* (S. D. N. Y., 1944), 59 F. Supp. 831 and *O'Neal v. United States* (E. D. N. Y., 1925), 11 F. 2d 869, aff'd *per cur.* (2d Cir., 1926) 11 F. 2d 871, which had held the benefits of the FECA exclusive in suits under the Public Vessels and Suits in Admiralty Acts.

the Supreme Court that the 1916 Act was by its terms exclusive.

The Supreme Court had early reached the same view. The Court's declaration that the 1916 Act is by its own terms exclusive of any right of action for damages for service-incident injury or death despite the existence of a judicial remedy under a jurisdictional statute is found in *Dahn v. Davis*, (1922) 258 U. S. 421, aff'g *Hines v. Dahn*, (8th Cir., 1920) 267 Fed. 105. There the Court quoted the provisions of the Compensation Act and explained them, as the Second Circuit did later, as meaning that while there were two *remedies* the sole *recovery* was under the Compensation Act, observing (p. 429) that, "it would be difficult to frame a clearer declaration than this that no payment would be made by the Government for injuries received other than as provided in the Act" and construing the language of the whole act as evidencing (p. 430) "the disposition to treat the compensation provided for as adequate for the injuries received" and negating the existence of any other rights against the United States therefor.

In *Dahn's* case, a railway mail clerk employed by the Post Office Department was injured in the performance of duty by the negligence of the Illinois Central Railroad Company. His widow obtained an award under the Federal Employees' Compensation Act. Suit was then brought against the railroad and the Director General of Railroads. Plaintiff pointed out that by virtue of Section 10 of the Federal (Railroad) Control Act of March 21, 1918, c. 25, 40 Stat.

451, no defense was to be made by the Director on the ground that the railroad was an agency of the Government. Plaintiff argued that this made the Director for compensation purposes a third party tort-feasor the same as a private carrier. The Eighth Circuit rejected this contention. It held, however, that although he had two remedies—one judicial, the other administrative—plaintiff was precluded from recovery because (like libelants in the cases now at bar) she had claimed compensation and the administrative claim was not disallowed.¹⁶

On certiorari the Supreme Court agreed with the decision below that while plaintiff had two *remedies*, one by suit and one by claim for compensation (258 U. S. at 428), he was *precluded from any recovery* in the exercise of his judicial remedy. Unlike the Circuit Court, however, the Supreme Court rested its

¹⁶ The Eighth Circuit said (267 Fed. at 114): “* * * We are of the opinion that as to the United States the act in question is compulsory, if the employe gives the notice and files the claim in proper form according to the terms of the statute and the regulations of the commission. It is optional with the employe as to whether he will make a claim under the act or not. If he does not, in our opinion he would have a right to maintain the present action and prosecute the same to judgment, as we think that the United States as to this particular case by the Federal Control Act consented to be sued. But if the employe elects to receive the benefits of the Compensation Act and his claim is allowed, then he is barred from prosecuting his action for negligence against the United States. In other words, he must elect which of the two remedies he desires to pursue, and, having elected to pursue one, he may not pursue the other. The United States under the statute being bound to pay the plaintiff after the latter has elected to claim the benefits of the Compensation Act, the remedy afforded by the act is exclusive. * * *”

decision as to preclusion not alone upon the single ground of "election," but upon the double ground (258 U. S. at 432) of first, "the distinct expression of purpose on the part of Congress which we have found in the Compensation Act, to treat the payments under it as sufficient and final" and, *second*, "because the petitioner elected to pursue to payment the remedy given him thereunder."

In commenting on section 7, which provides that while in receipt of compensation a Federal employee shall not receive any other "remuneration" from the United States, the Supreme Court said (p. 429):

Section 7 of the act specifically declares that so long as any employee is receiving installment payments under the act, or if he has been paid a lump sum in commutation of installment payments, then until the expiration of the period during which installment payments would have continued, "he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed," and except pensions for service in the Army or Navy.

It would be difficult to frame a clearer declaration than this that no payment would be made by the Government for injuries received other than as provided for in the act. [Emphasis supplied.]

And in commenting upon Sections 26 and 27, respecting election in suits against third party tort feasons, the Court further observed (p. 430):

Plainly, by these two sections Congress deals with the liability of persons "*other than the*

United States” to employees entitled to compensation under the act, not for the purpose of increasing that compensation, but for the purpose of reimbursing the Government for payments made and of indemnifying it against other amounts payable in the future. *The sections emphasize the disposition to treat the compensation provided for as adequate for the injuries received, and they negative any intention on the part of the Government to make further payments.* [Emphasis supplied.]

The existence of *two remedies*, one by suit, the other by claim for compensation, is in entire accord with the Court’s holding that *recovery was precluded* both because the statute expressly declared “that no payment would be made * * * other than as provided for in the Act” and emphasized “the disposition to treat the compensation provided for as adequate” and also because plaintiff had “elected.” The existence of a *remedy* by suit is not, of course, conclusive of a right of *recovery* in the exercise of such remedy. As Justice Jackson explained in respect of the similar existence of a remedy by suit in *Feres v. United States*, (1950) 340 U. S. 135, 141, a remedy is granted:

* * * But it does not say that all claims must be allowed. Jurisdiction is necessary to deny a claim on its merits as matter of law as much as to adjudge that liability exists. We interpret this language to mean all it says, but no more. Jurisdiction of the defendant now exists where the defendant was immune from suit before; it remains for courts, in

exercise of their jurisdiction, to determine whether any claim is recognizable in law (p. 141).

And the existence of a right to compensation precludes the existence of any other right recognizable in the exercise of claimant's remedy by suit.

When the 1949 amendments to the Federal Employees' Compensation Act were adopted by the Act of October 14, 1949, c. 691, 63 Stat. 854, they did not modify and were not intended to modify the pre-existing exclusiveness of compensation benefits where available. On the contrary, it was expressly stated that Congress was not legislating upon "certain claims and denials of a right of election of remedies under existing laws" (see *infra*, pp. 55-57), but was leaving that question for resolution by the courts.

Following *Dahn v. Davis*, *supra*, in 1922, the courts were unanimous until 1946 in holding compensation benefits under the Federal Employees' Compensation Act to be exclusive.¹⁷ But in *United States v. Marine*, (4th Cir., 1946) 155 F. 2d 456, and *Mandel v. United States*, (E. D. Pa., 1947) 74 F. Supp. 754 (since reversed on August 16, 1951), a conflicting opinion was expressed. But the record in *Marine* did not establish that the libelant was entitled to an award of compensation and the Department of Justice concluded

¹⁷ *O'Neal v. United States*, (E. D. N. Y., 1925) 11 F. 2d 869, aff'd (2d Cir., 1926) 11 F. 2d 871; *Posey v. T.V.A.*, (5th Cir., 1937) 93 F. 2d 726, *Thomason v. W. P. A.*, (D. Idaho, 1942) 47 F. Supp. 51, 54, aff'd (9th Cir., 1943) 138 F. 2d 342; *Lopez v. United States*, (S. D. N. Y., 1944) 59 F. Supp. 831; *White v. T. V. A.*, (D. Tenn., 1945) 58 F. Supp. 776.

that it would not justify application for certiorari. Instead, the Department and the Compensation Bureau determined to seek a declaratory amendment making section 7 of the act (5 U. S. C. 757) announce in express terms the old pre-1946 rule of exclusiveness of compensation benefits where available.¹⁸

Since the merchant seamen of WSA/Maritime Commission vessels were already allowed recovery by suit but were expressly excluded from compensation benefits by the Clarification Act, while it was inconceivable that the armed forces civilian seamen often serving in the presence of the enemy could be given a right of action against the United States for tort, it was not thought that seamen's status could be in any wise affected by the compensation act amendments and the question was not raised at the hearings.¹⁹ The bill,

¹⁸ After the decision to seek legislation rather than certiorari was taken, the Tenth Circuit chose to follow the *Marine* rather than the *Posey* case and rest decision on estoppel by acceptance of benefits. *Parr v. United States*, (10 Cir., 1949) 172 F. 2d 462. Meanwhile the lower court's opinion in the *Mandel* case, since reversed by this court, was followed in the Northern District of California. *Henz v. United States*, 1950 A. M. C. 714; *Sims v. United States*, 1950 A. M. C. 714; *Banks v. United States*, 1950 A. M. C. 1400; *Gibbs v. United States*, 94 F. Supp. 586; *Wright v. United States*, 95 F. Supp. 77.

¹⁹ It should be remembered that the Clarification Act itself had been only declaratory of the pre-existing law that the exclusive remedy of merchant seamen on vessels operated by the Shipping Board/Maritime Commission/War Shipping Administration was by suit under the Suits in Admiralty Act without any right under the FECA. See cases collected in *Gibbs v. United States*, (N. D. Calif., 1950) 94 F. Supp. 586, 589, fn. 9, and referred to by the Third Circuit in *Mandel*, footnote 15. The Attorney General after first holding such seamen not entitled to compensation had reversed himself. Cf. 34 Ops. A. G. 363 with 34 *ibid.* 120. But the

including the express declaration of existing law as to the exclusiveness of compensation where available, passed the House and was favorably reported in the Senate by the Committee on Labor and Public Wel-

Comptroller General, whose views control the payment of money, declined to follow and adhered throughout to his original view that the Suits in Admiralty Act provided such seamen their exclusive remedy. Thus, following the decision in the *Lustgarten* case (*Johnson v. United States Fleet Corp.*, (1930) 280 U. S. 320), he reaffirmed his view, citing that case and declaring (Decision A-31684, September 10, 1930): "While the Employees' Compensation Act was not mentioned nor considered, the conclusion seems justified that the remedy available to a member of a crew of a merchant vessel owned by the United States and operated by or for the Merchant Fleet Corporation, to recover for injury sustained during employment, is also, exclusive of any right or remedy under the Employees' Compensation Act. * * * Accordingly, in view of the latest rulings of the Supreme Court of the United States, above cited, the form of agreement for operation of ships, and the specific provisions contained in the annual appropriation acts for the purchase of all forms of insurance by the Merchant Fleet Corporation, it is believed reasonable to conclude that, under existing law, the Employees' Compensation Commission may not entertain, settle, or pay any claims under the Employees' Compensation Act by or on behalf of members of the crews of vessels owned or operated by the United States Shipping Board Merchant Fleet Corporation, or the beneficiaries of such who die as a result of such injuries sustained in the course of their employment on such vessels." Until 1943, however, the insurance carriers on these government merchant vessels commonly offered their crew members voluntarily settlement on the basis of the compensation benefits under the FECA to which they would have been entitled if employed on army and navy vessels. See e. g. *Hillenbrand v. United States*, 1929 A. M. C. 885; *Stewart v. United States*, (E. D. La., 1928) 25 F. 2d 869. This was in full accord with the similar voluntary practice of insurance carriers on private commercial vessels. See e. g. *Bay State Dredging Co. v. Porter*, (1st Cir., 1946) 153 F. 2d 827; *In re Panama Transport Co.*, (S. D. N. Y. 1951) 98 F. Supp. 114, 117.

fare, which explained the need for the declaratory amendment, saying (S. Rep. 836, 81st Cong., 1st Sess., p. 23):

Workman's compensation laws, in general, specify that the remedy therein provided shall be the exclusive remedy. The basic theory supporting all workmen's compensation legislation is that the remedy afforded is a substitute for the employee's (or dependent's) former remedy at law for damages against the employer. With the creation of corporate instrumentalities of Government and with the enactment of various statutes authorizing suits against the United States for tort, new problems have arisen. Such statutes as the Suits in Admiralty Act, the Public Vessels Act, the Federal Tort Claims Act and the like, authorize in general terms the bringing of civil actions for damages against the United States. * * * This situation has been of considerable concern to all Government agencies and especially to the corporate instrumentalities.

But the seamen's unions became apprehensive that the declaratory amendment might alter the existing law respecting merchant seamen and thereby bring them under compensation. It was accordingly agreed that the text of the declaratory amendment in the bill as passed by the House should be further amended so as to make it absolutely plain beyond question that no change was being made in the existing law relating to either merchant or to army and navy civilian seamen. See the Third Circuit's *Mandel* opinion, foot-

note 8; *Johansen v. United States*, (S. D. N. Y.) 1951 A. M. C. 117, aff'd (2d Cir.) July 30, 1951.

Senator Douglas, in charge of the bill, explained his reasons for accepting these precautionary amendments designed to make sure that the prior status of seamen was preserved. He stated (95 Cong. Rec. 13609):

Mr. President, I should like to state my ground for agreeing to the amendments offered by the Senator from Oregon. *The primary consideration for accepting the Senator's amendments preserving the maritime rights and other statutory remedies of seamen is the fact that no hearings were held, no arguments were heard, and no discussion was had on this aspect of the pending bill.*

* * * * *

It is my further understanding that this bill as amended will only change the status quo of seamen to the extent that it increases compensation rights of those Government-employed seamen covered by the act [i. e., army and navy public vessel seamen covered by compensation as opposed to merchant seamen excluded from compensation by the decisions of the Comptroller General and the Clarification Act.] For the same reason, namely, that we have had no hearings on the matter, *we are not seeking to legislate affirmatively as to certain claims and denials of a right of election of remedies under existing laws*, which claims and denials have not yet been adjudicated by the Supreme Court, although various other Federal courts have, in effect, held that federally employed seamen

have such an election. [Italics and matter in brackets supplied.]

It is thus abundantly clear that those in charge of the bill meant to continue the distinction, as previously recognized by the majority of courts, between crew members of army and navy vessels suing under the Public Vessels Act and WSA/Maritime merchant seamen entitled to sue under the Suits in Admiralty Act but occasionally said to be suing under the Public Vessels Act.²⁰

It is equally clear that those urging the floor amendment did not intend to alter the rights of army and navy civil service crew members. Their perfectly reasonable intent was to make sure that the merchant seamen, who had been excluded from compensation coverage by the Comptroller General and the Clarification Act, were not brought under the compensation act by implication. Thus, Senator Morse, in presenting the floor amendments represented to the Senate (95 Cong. Rec. 13607):

Mr. President, I understand the Senator from Illinois is willing to accept the amendment. *In effect it continues the seamen in exactly the same legal position which they presently enjoy.*

This matter was fought out in 1941 when an attempt was made to bring the seamen under

²⁰ See e. g., *Krey v. United States*, (2d Cir., 1941) 123 F. 2d 1008, where the opinion states jurisdiction was under the Public Vessels Act. The file papers show, however, that the vessel was operated for the Maritime Commission, the libel (Article 10) invoked jurisdiction under the Suits in Admiralty Act and the answer admitted it.

the act, and it was defeated at that time.²¹ This amendment continues the historical legal pattern, as far as the seamen are concerned, in respect to workmen's compensation rights. *All my amendment does, in effect, is to leave the seamen exactly in the position in which they now are in respect to their legal rights to compensation, giving them, under admiralty law, the right to sue for their compensation. [Italics supplied.]*

²¹ The Government believes Senator Morse here refers not to the coverage by the Federal Employees' Compensation Act of civil service crew members of army and navy vessels for they had been under compensation since 1916 and any other treatment of them would be incompatible both with their own interests and the national security, but to the attempt to bring private merchant seamen on commercial vessels under the Longshoremen's Act. See Senate Committee on Commerce, Hearings on H. R. 6881, 76th Cong., 3d Sess. On September 12, 1940, the Senate agreed to a Resolution referring the question of workmen's compensation for privately employed seamen to the interested Government agencies for investigation. S. Res. 299, 76th Cong., 3d Sess.; 86 Cong. Rec. 12002. The agencies' report was transmitted to the Senate on September 17, 1941, and referred to the Committee on Commerce. S. Doc. 113, 77th Cong., 1st Sess.; 87 Cong. Rec. 7434. The change was vehemently opposed by the seamen's unions and no further action was taken. In 1926 the proposal to include private merchant seamen in the coverage of the Longshoremen's Act followed the same course. The bill originally reported in the House included seamen, that in the Senate did not. S. Rep. 973, 69th Cong., 1st sess. The Senate bill passed first but the House substituted its bill. H. Rep. 1767, 69th Cong., 2d sess. The seamen's representatives succeeded in having them excluded. 68 Cong. Rec. 5402-3, 5411, 5414, 5908. The hearings are illuminating. 69th Cong., 1st sess., Senate Judiciary Committee, hearings on S. 3170 (March 16, April 2, 1926); House Judiciary Committee, hearings on H. R. 9498 (April 8, 15, 22, 1926), hearings on S. 3170 (June 29, 1926).

Senator Magnuson similarly observed of the floor amendment (95 Cong. Rec. 13607) :

* * * What it does, of course, as the Senator from Oregon has said, is to leave the seamen in their tort right of compensation just as they are now without placing them under the act.

It is thus plain, as was held by the Third Circuit in *Mandel* and the District Court in *Johansen* (see *supra*, p. 54), that Congress, including even the congressional proponents of the floor amendment, meant only to preserve the prior status of all seamen—army and navy seamen with their exclusive right of compensation, WSA/Maritime Commission merchant seamen with their exclusive right of suit.

Congress was not “seeking to legislate affirmatively” and did not intend, without hearing the representatives of the army and navy, to change the existing law or affirmatively adopt into law the view of the lower court in *Mandel v. United States*, 74 F. Supp. 754 (since reversed by Third Circuit on August 16, 1951, as well as rejected by the Second Circuit in *Johansen v. United States*, decided July 30, 1951), that recovery for death or injury of members of the civil service component of the crew of army and navy vessels was thenceforth to be allowed recovery by suit. In accordance with the demand of the seamen’s representatives, the question was left undisturbed by the Congress with the intention that the point should first be litigated in the Supreme Court.

It results that the 1949 amendments made no change in the 1916 law and that, as declared by the Second

Circuit in *Feres* and by the Supreme Court in *Dahn*, where compensation benefits are available under the Federal Employees' Compensation Act, as they are in the case of army and navy crew members, they are exclusive of any right of recovery in suits against the United States in the exercise of whatever judicial remedy is available.

IV

Unless compensation is exclusive where available, insolvable difficulties in respect of double recovery or election are produced; it is impossible to distinguish between civil and military employees

The omission of Congress to make any express provision regarding double recovery or election confirms the view of the Second Circuit in *Feres* (*supra*, pp. 23-25) and of the Supreme Court in *Dahn* (*supra*, pp. 25-29) that when read together the various provisions of the Federal Employees' Compensation Act "emphasize the disposition to treat the compensation provided for as adequate for the injuries received, and they negative any intention on the part of the Government to make further payments" (258 U. S. at 430). The difficulties of harmonizing a right of recovery by suit under whatever judicial remedy is available with the compulsory duty imposed on the Government by section 1 of the Act to pay compensation in all events is too obvious to have been overlooked by Congress. It has long been familiar, as the Third Circuit pointed out in *Mandel* (slip opinion, p. 5, footnote 9) that "Unless the statute otherwise provides, the remedies afforded by the workmen's

compensation act are exclusive'' (71 Corp. Jur. § 1488, p. 1480).

The Supreme Court in *Feres v. United States*, (1950) 340 U. S. 135, gave controlling weight to this absence of express statutory direction by Congress. It said (p. 144):

This Court, in deciding claims for wrongs incident to service under the Tort Claims Act, cannot escape attributing some bearing upon it to enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death or those in armed services. We might say that the claimant may (a) enjoy both types of recovery, or (b) elect which to pursue, thereby waiving the other, or (c) pursue both, crediting the larger liability with the proceeds of the smaller, or (d) that the compensation and pension remedy excludes the tort remedy. There is as much statutory authority for one as for another of these conclusions. If Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other. The absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service.

We believe that the identity of the problem presented, whether the disability benefits are under the civil or the military service statutes, indicates that an identical intention would have existed on the part of Congress in respect of civil and military employees alike.

The necessity for reaching an identical conclusion whether civil or military service personnel is involved is further reenforced by the right of military reservists on temporary active duty to elect between benefits under the military compensation statutes and the usually more favorable Federal Employees' Compensation Act benefits.²² The absurd results of the Fourth Circuit view are at once obvious. The rule of the *Feres* case can be entirely avoided. If claimant elects the smaller military benefits²³ he is confined to them by *Feres*, but if he elects benefits under the Federal Employees' Compensation Act he may first obtain an award and then reject the payments and recover by suit under the Public Vessels, Suits in Admiralty, or Tort Claims Acts.

The dispositive character of the absence of Congressional authorization for double recovery or election which the Supreme Court relied on in *Feres* is fully demonstrated when the cases trying to apply the "election" rule are examined. Where crew members are involved, the problem of election is complicated

²² See sec. 7 (5 U. S. C. 757), proviso to para. (a) as added by Act of July 1, 1944, c. 373, 58 Stat. 712, and the various statutory provisions cited in footnote 7, *supra*, p. 26.

²³ A wife and one child is entitled to \$78 in the event of the service-incident death of a soldier regardless of rank (38 C. F. R. 1946 Supp. § 35.06, p. 5913). In addition the widow receives the six months death gratuity according to the pay of the decedent's grade. Act of December 17, 1919, as amended (41 Stat. 367, 57 Stat. 599, 10 U. S. C. 903). Under the F. E. C. A. a wife and one child receive 55 percent of decedent's pay taken at not less than \$150 per month. In the present case Mrs. Vatuone would receive \$137.28 per month. In the *Mandel* case the benefits for the widow and child were \$226.41 per month.

by the seamen's enjoyment of special privileges as wards of the admiralty judges. Thus, it has been held that even collection of cash benefits by a seaman does not preclude him from recovery by suit. *Johnson v. United States*, (4th Cir., 1950) 186 F. 2d 120; *Bay State Dredging Co. v. Porter*, (1st Cir., 1946) 153 F. 2d 827; cf. *Garrett v. Moore-McCormack Co.*, (1942) 317 U. S. 329; *Muruaga v. United States*, (2d Cir., 1949) 172 F. 2d 318. District courts, however, have held the contrary. *Wright v. United States*, (N. D. Calif., 1950) 95 F. Supp. 77; *Banks v. United States*, (N. D. Calif.) 1950 A. M. C. 1400; *Frader v. United States*, (S. D. N. Y., 1950) 91 F. Supp. 657; *Johansen v. United States*, (S. D. N. Y.) 1951 A. M. C. 117, aff'd (2d Cir.) July 30, 1951.

Where shoreside employees are involved, however, the general rule is as stated in 71 Corpus Juris, p. 1488:

An election to take compensation under the statute as evidenced by bringing proceedings to secure compensation, even though compensation is denied, or the right thereto disputed, or by accepting medical services * * * bars an action to recover damages.

Thus in *Hines v. Dahn*, (8th Cir., 1920) 267 Fed. 105, 114, aff'd *sub nom. Dahn v. Davis*, (1922) 258 U. S. 421, it was stated that the making of the award even without its collection precluded suit.²⁵ The same rule

²⁵ This appears to stem from the fact that where the United States is concerned, mere delivery of a check is a binding payment without cashing it. See *Beers v. Social Security Administrator*, (D. Conn., 1948) 80 F. Supp. 183, aff'd (2d Cir., 1949) 172 F. 2d

was recently followed in *Ocasio v. United States*, (D. Puerto Rico) 1951 A. M. C. 1297. State courts have similarly held that when a claim for compensation is adjudicated the award acts as *res judicata* and estops the claimant from refusing the payment and bringing suit. *Nyland v. Northern Packing Co.*, (1928) 56 N. D. 624, 218 N. W. 869; *Sotonyi v. Detroit City Gas Co.*, (1930) 251 Mich. 393, 232 N. W. 201.²⁶ Even acceptance of medical benefits is held to constitute an election *Gibbs v. United States*, (N. D. Calif.) 1951 A. M. C. 487; *Mains v. J. E. Harris Co.*, (1938) 119 W. Va. 730, 197 S. E. 10, 12; *Hlas v. Quaker Oats Co.*, (1930) 211 Iowa 348, 233 N. W. 514. Indeed in *Talge Mahogany Co. v. Burrows*, (1921) 191 Ind. 167, 130 N. E. 865, 873, the court said:

It is not the law that a person who has done an act, with full knowledge of all material facts, can avoid the consequences annexed by law to such act, by alleging and testifying that when he did it he was not advised that the law gave him a choice between that course and a different one, and that he afterward learned that the law was and chose the different course.

34; *Anthony P. Miller, Inc. v. C. I. R.*, (2d Cir., 1947) 164 F. 2d 268, 269; "It is common to speak of 'paying' an obligation by giving one's check for it." Delivery fully perfected the election made in filing claim. Where the Government is concerned no question of collectibility can be involved and the Government's promise in the check differs in no respect from its promise in its regular paper currency.

²⁶ The filing of claim for compensation is an election and under the rule of exhaustion of administrative remedies requires that any pending suit be stayed or dismissed. *Simas v. Dugan*, (R. I., 1922) 116 Atl. 755.

We believe that this divergence of views respecting election confirms the practical correctness of the Supreme Court's statement in *Feres*, with respect to double recovery or election (340 U. S. at 144), that "there is as much statutory authority for one as for another of these conclusions" and that therefore the absence of any congressional direction "is persuasive that there was no awareness that the Act might be interpreted to permit recovery." Thus, we submit, on the one hand, that dismissal in these three cases of *Vatuone*, *Allen* and *Gibbs*, as in the Eighth Circuit's view of the *Dahn* case, might properly follow from libelants' acts of making claim and obtaining compensation despite filing suit. On the other hand, however, we believe that, as in the Supreme Court's view of the *Dahn* case, dismissal can be based equally, if not primarily, upon the ground that the terms of the Federal Employees' Compensation Act itself establish the congressional disposition "to treat the compensation as adequate for the injuries received, and they negative any intention on the part of the Government to make further payments" (258 U. S. 430). This latter approach accords with the majority rule of the *Mandel*, *Lewis*, *Johansen* and *Posey* cases; we urge its adoption here.

CONCLUSION

For the foregoing reasons, we believe that libelant was precluded from recovery, first, because the right to compensation benefits was exclusive, and, second, because claiming an award was an irrevocable elec-

tion which could not be rescinded by later returning the compensation checks. It is accordingly submitted, most respectfully, that the final decree of the court below should be reversed with instructions to dismiss the libel for failure to state a cause of action.

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SEPTEMBER 1951.

No. 12,906

IN THE

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

RINA MARIA VATUONE, as Administra-
trix of the Estate of Paul D. Vatu-
one, Deceased,

Appellee.

On Appeal from the United States District Court for the
Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

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No. 12,906

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA,

Appellant,

VS.

RINA MARIA VATUONE, as Administra-
trix of the Estate of Paul D. Vatu-
one, Deceased,

Appellee.

On Appeal from the United States District Court for the
Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

Rina Maria Vatuone, administratrix of the estate of Paul D. Vatuone, brought this action under the provisions of the Public Vessels Act, 46 U.S.C.A., 781 et seq., against the United States for the death of her husband, who was injured and killed on June 15, 1949, while engaged as a rigger employed by the Army Transport Service at Fort Mason, San Francisco, California, Port of Embarkation. Vatuone was sent, on the date of his death, aboard the Army

transport "General D. E. Aultman" to do certain repair work on the davits of No. 5 Lifeboat. (R. 15.) The vessel was owned and operated by the Army Transport Service, and at the time, said vessel was in the navigable waters of the United States and docked alongside a dock at Oakland, California. While decedent Vatuone and another workman were manually winding a cable around the drum of the winch which operated said No. 5 lifeboat, appellant carelessly and negligently put in operation the motor operating said winch so that said winch suddenly and very swiftly revolved, and the handle of the winch struck decedent with such force that he was thrown violently to the deck and was killed. (R. 16.) The testimony showed that the motor operating the winch was not under the control of the riggers, including Vatuone, but that said motor was under the control of the electrician included in the crew of said vessel. (R. 161-185.) The Court below found that Vatuone was killed through the negligence and carelessness of the appellant.

Vatuone was survived by his dependent widow and his infant daughter. (R. 16.)

Shortly after Vatuone's death, the authorities at the Fort Mason Army Transport Service instituted, on appellee's behalf, a petition for compensation under the Federal Employees' Compensation Act, 5 U.S.C.A. 751, and informed appellee that she could get compensation and that she could also sue the United States for damages, but that the amount of compensation she might receive would be deducted

from the amount. (R. 132 and 133.) Appellee believed these statements to be true and signed a claim for compensation under said Act, but before said application had been passed on, or any award made, appellee, on July 23, 1949, through her attorney, telegraphed her withdrawal of said claim to the Bureau of Employees' Compensation, requesting that her application for compensation be withdrawn without prejudice, as she contemplated a suit against the United States. (R. 203.) The libel herein was filed on August 1, 1949, before any award for compensation was made, a copy of said libel and the citation thereon was served on the United States attorney and copies were sent by registered mail to the Attorney General in Washington. On August 3, 1949, the Bureau of Employees' Compensation made its order awarding appellee compensation under the Federal Employees' Compensation Act. (R. 134.) Subsequently, two compensation checks were mailed to appellee, who did not accept said checks and sent them back to the Government (R. 135) with written instructions stating that she was not accepting compensation and had elected to sue, and requested that the Government send no further checks (R. 136 and 201). Thereafter, no further compensation checks were ever sent to appellee, and appellee has never accepted or cashed any compensation checks. (R. 135 and 136.)

SUMMARY OF ARGUMENT.

Appellee's argument can be reduced to the following points:

1. Prior to the amendment to the Federal Employees' Compensation Act, 5 U.S.C.A., Sec. 751 et seq., effective October 14, 1949, a Federal civil service employee, in the category of decedent herein, had an election to take compensation under the Act or pursue any judicial remedy that he might have, and the Federal Employees' Compensation Act was not exclusive as to him.

2. The non-acceptance of compensation under the Federal Employees' Compensation Act does not preclude a suit under the Public Vessels Act, 46 U.S.C.A. 781.

3. The Fellow Servant Doctrine is not applicable as a defense herein.

We shall discuss the points listed below, seriatim. The primary point of this brief, however, is devoted to the question whether compensation, when available, precludes recovery by suit.

A. THE FEDERAL EMPLOYEES' COMPENSATION ACT IS NOT EXCLUSIVE AS TO APPELLEE.

The Federal Employees' Compensation Act was originally enacted in 1916. Since that time, the Federal Appellate Courts have consistently held, until recent contrary decisions in the Second, Third, Fifth and District of Columbia Circuits, that a right to

such compensation, when available, does not preclude actions at law under the Public Vessels Act, Suits in Admiralty Act or under the Federal Tort Claims Act, and that a claimant has an absolute election whether to take either by way of compensation or by suit.

The Federal Appellate Courts, as early as 1921, in the Seventh Circuit, in the case of *Payne v. Cohlmeier* (7 Cir. 1921) 275 F. 803, and in the Fifth Circuit, in 1922, in the cases of *Panama RR. Co. v. Strobel* (5 Cir. 1922) 282 F. 52, and *Panama RR. Co. v. Minnix* (5 Cir. 1922) 282 F. 47, have held that the remedy given to an employee of the United States for an injury incurred through negligence of the United States is not exclusive under the Federal Employees' Compensation Act, and that an injured Government civil service employee may at his election maintain an action at law or take compensation under the Act.

Payne v. Cohlmeier, supra, involved an injury to a Deputy United States Marshal, who was injured in a railroad accident while on official duty. The Government there contended that his only right was to compensation under the Federal Employees' Compensation Act and not a suit against the United States Director General of Railroads. The Court therein said as follows:

“Because plaintiff was a deputy marshal of the United States it is claimed his right to recover is fixed and determined by the Federal Compensation Act * * * We conclude, however,

that he was in a position to maintain this action. While an employee may elect to take under the Compensation Act, he is not required so to do."

In the two *Panama R.R. Co.* cases in the Fifth Circuit, *supra*, the question raised was whether a Government employee injured on the Panama Railroad was entitled to maintain an action at law, or whether the Compensation Act was the only remedy. The Fifth Circuit held that such Government employees had an election to either take compensation or to bring an action for damages.

The Fourth Circuit, in the cases of *Johnson v. United States* (4 Cir. 1950) 186 F. (2d) 120 and *United States v. Marine* (4 Cir. 1936) 155 F. (2d) 456, has recently expressly held that the Federal Employees' Compensation Act is not exclusive.

In the *Marine* case, a United States custom inspector was injured in the course of his employment while on a gangway leaving a vessel owned and operated by the United States. He brought action under the Suits in Admiralty Act, and the sole question involved was the Government's contention that the libelant's sole and exclusive remedy against the Government was a claim under the Employees' Compensation Act. Judge Groner in disposing of the contention said:

"In substance, the provision in question is that whenever a proceeding in admiralty could be maintained against a privately owned and operated vessel, a libel in personam may be brought

against the United States in the operation of its merchant fleet. We are not at liberty to alter or add to the plain language of the statute to effect a purpose which does not appear on its face. There is certainly no suggestion in this language, or in any other language of the Suits in Admiralty Act, which implies that the right is limited to persons outside the provisions of the Employees' Compensation Act, and it is a fair inference that if Congress had intended that result it would have said so in unmistakable terms. The fact, of course, is that the inference is directly the other way. * * * What we have shown as to a lack of any reservation of immunity in the Suits in Admiralty Act, applicable in the circumstances of this case, impels the conclusion that there is nothing in the Act which expressly or impliedly excludes a Government employee from filing a libel under its terms. And in the same degree it is equally true that there is nothing in the Federal Employees Compensation Act which directly or indirectly would bar the right."

The *Johnson* case, cited *supra*, involved an injury to a civilian deck hand aboard a patrol boat, a public vessel of the United States in the harbor of Norfolk, Virginia. There again the Fourth Circuit reiterated its earlier decision in the *Marine* case and found the Government's contention untenable. The Court therein said, speaking through Judge Soper:

"The argument is not without persuasive force but we do not find it convincing, primarily because the special provisions which Congress has

made for members of the armed forces do not apply to civilian seamen. The right to compensation for injuries under the federal statute was not established especially for the protection of seamen but for all government employees in general; and they were not confined to the remedy by way of compensation prior to the amendment of the Compensation Act in 1949 cited above. Furthermore, the considerations of national security and military discipline do not apply with equal force to the smaller class of civilian seamen as to the naval personnel so as to justify the courts in ignoring the plain and comprehensive terms of the statute. That course may not be taken in any case unless the liberal construction leads to results so startling that they cannot reasonably be thought to have been within the legislative intent. *U.S. v. American Trucking Ass'n*, 310 U.S. 534, 543, 60 S.Ct. 1059, 84 L. Ed. 1345. * * * The legislative history of the Federal Employees' Compensation Act does not militate against this conclusion. It was passed in 1916 before the statutes which now permit suits against the United States for maritime torts and for torts in general. It was devoid of the provision usually found in compensation statutes that the benefits conferred upon the employee are exclusive of any other recovery against the employer; but this omission is understandable since there was no preexisting right to sue the United States for tort. The question of a possible choice of remedies did not arise until permissive statutes, broad enough to cover government employees as well as private citizens, were enacted;

and when that occurred in the case of a postal employee injured on a railroad operated by the United States under the Federal Control Act of 1918, the court said in *Dahn v. Davis*, 258 U.S. 421, 429, 42 S.Ct. 320, 66 L.Ed. 696, that he had two remedies against the United States—one under that Act and one under the Compensation Act.”

The United States Supreme Court in two decisions has by way of dicta, assumed that a federal employee has always had an election between tort action and a claim to compensation. In *Brady v. Roosevelt Steamship Co.*, 317 U.S. 575, 577; 87 L.Ed. 471, the Court said:

“and we may assume that petitioner could have sued either the United States or the Commission under the Suits in Admiralty Act.”

This case involved an injury to a customs inspector as the result of a defective ladder while leaving a vessel. The vessel was owned by the United States and operated by a private company for the Maritime Commission.

In *Dahn v. Davis*, 258 U.S. 421; 66 L.Ed. 696 the Supreme Court indicated that an injured railway mail clerk had an election to sue the Government for his injuries under the Federal Control Act of 1918 (40 Stat. at L. 451, Chap. 25) or else take under the Compensation Act.

For the last thirty years the United States Supreme Court and the Federal Appellate Courts have either

expressly recognized the right of election to sue in tort or take compensation, or else have consistently assumed such right of election and have granted relief under tort or admiralty action.

For years, numerous suits by civilian employees of the Government have been allowed to proceed to judgment in the Ninth Circuit of the United States Court of Appeals and the United States District Court for the Northern District of California without any discussion by the Court of the effect of the Federal Employees' Compensation Act.

United States v. Loyola (9th Cir. 1947) 152 F. (2d) 126 (wherein the Court held that a civil service employee on an Army transport had a right of action against the Government under the Public Vessels Act).

McInnis v. United States (9th Cir. 1945) 152 F. (2d) 387 (wherein the Court held that "the United States in the operation of its merchant vessels" is liable for the relief of a seaman for his maintenance and cure).

Thomason v. United States (9th Cir. 1950) 184 F. (2d) 105 (wherein the Court held that exclusive jurisdiction of wage suits by Federal civil service employees serving as seamen on public vessels is under the Public Vessels Act and Suits in Admiralty Act).

Gibbs v. United States, D.C.N.D. Cal. 1950 - 94 F.S. 586 (wherein a civilian repairman working on a Navy

carrier was injured and obtained judgment under the Public Vessels Act).

Sims v. United States, D.C.N.D. Cal. 1949 - 1950 A.M.C. 714.

In *Gibbs v. United States*, *supra*, Judge Goodman said:

“Indeed numerous suits by seamen injured on government merchant vessels have been allowed to proceed against the United States and the United States Shipping Board Fleet Corporation without any discussion of the effect of the FECA. (Footnote.) The Supreme Court itself appears to have taken it for granted that the FECA is not an exclusive remedy. This it has done in several cases, even though what it has said may be characterized as dicta. Yet its reiteration, if it be dicta, is, to say the least, cumulatively persuasive.”*

*Judge Goodman in the Gibbs decision cites the following cases where injured seamen on Government merchant vessels have been allowed to proceed against the United States:

See, e.g. *Axtell v. United States*, D.C.E.D.N.Y. 1922, 286 F. 165; *Unica v. United States*, D.C.S.D. Ala. 1923, 287 F. 177; *Morris v. United States*, 2 Cir., 1924, 3 F.2d 588; *United States Shipping Board Emergency Fleet Corporation v. O'Shea*, 1925, 55 App.D.C. 300, 5 F.2d 123; *Zinnel v. United States S.B.E.F.C.*, 2 Cir., 1925, 10 F.2d 47; *Hansen v. United States*, D.C. S.D. Ga. 1926, 12 F.2d 321; *Maloney v. United States*, D.C.S.D. N.Y. 1927, 7 F.Supp. 14; *U.S.S.B.E.F.C. v. Greenwald*, 2 Cir., 1927, 16 F.2d 948; *Stewart v. United States*, D.C.E.D. La. 1928, 25 F.2d 869; *Howarth v. U.S.S.B.E.F.C.*, 2 Cir., 1928, 24 F.2d 374; *Ives v. United States*, 2 Cir., 1932, 58 F.2d 201; *Stratton v. United States*, D.C.S.D.N.Y. 1934, 8 F.Supp. 429; *Helmke v. United States*, D.C.E.D. La. 1934, 8 F.Supp. 521; *Carlson v. United States*, 5 Cir., 1934, 71 F.2d 116, 117; *Johnson v. United States*, 2 Cir., 1935, 74 F.2d 703; *Smith v. United States*, 5 Cir., 1936, 96 F.2d 976; *Desrochers v. United States*, 2 Cir., 1939, 105 F.2d 919.

B. DISTINGUISHING THE GOVERNMENT'S CASES.

The Government in support of its contention that the Federal Employees' Compensation Act is exclusive as to libelant and appellee herein relies upon the following four recent cases, all of which can be distinguished. These cases are *Mandel v. United States* (3d Cir.) decided August 16, 1951; *Johansen v. United States* (2d Cir.) decided July 30, 1951; *Lewis v. United States* (D.C. Cir. 1951) 190 F. (2d) 22; *Posey v. United States* (5th Cir. 1937) 93 F. (2d) 726.

Upon examination of these cases we find that in the *Mandel* and *Johansen* cases the Courts found an analogy between military personnel and civil service employees on military vessels *in military operations* and subject to military orders, and hence precluded civilian employees engaged in a military operation from tort action under the decision of *Feres v. United States*, 341 U.S. 138; 95 L.Ed. 135. In the instant case appellee was killed on vessel dockside in navigable waters and not while said vessel was engaging in military operations.

In the *Lewis* case a United States Park Policeman, killed on duty, was found by the Court to be analogous to a soldier in line of duty and hence precluded from the benefits of the Federal Tort Claims Act under the *Feres* decision.

In the *Posey* case the Court held that Congress had provided the Federal Employees' Compensation

Act as the exclusive remedy against the United States of injured employees of TVA, but the Court's decision was based entirely on features of the Tennessee Valley Authority Act which has no possible bearing here.

In the *Mandel* case a civilian officer of a Government tug was hit by a mine off Sardinia and killed, and the Court's decision was in a great part based on the fact that the Court found it against public policy to have judicial review of "negligence of an officer in a combat zone". The Court therein said:

"We find weight in the government's argument that it would not be in the public interest to have judicial review of the question of negligence in the conduct of military, or semi-military, operations. The operation of ships or land forces in the presence of the enemy is a matter where judgments frequently have to be made quickly and where judgments so made by commanding officers must have prompt and immediate response. It will not, we think, aid in the operation of the armed forces if the propriety of a Commander's judgment is to be tested months or years afterwards by a court or a court and jury."

In the case at bar, Vatuone was killed not in a military or even a semi-military operation, but while working aboard a public vessel dockside at Oakland, California.

In the *Johansen* case the libelant was a member of the crew of an Army transport and it was agreed

by the parties in that case that at the time of libellant's injury "*the transport was engaged in a military operation*" and the Court therein stated:

"Obedience by all members of the crew under the same sanctions may well be indispensable to the required maintenance of discipline in a military operation. Suits by civilian seamen, no less than by military personnel, would require judicial re-examination of the conduct of military affairs."

From the Court's language above it is apparent that its decision was based on the fact that at the time of injury the transport was engaged in a military operation and that the Court believed it would be against public policy to allow suit under those circumstances. It is incumbent upon us to again point out no military operation was being engaged in at the time of the death of decedent Vatuone herein. In fact, the United States District Court for the Southern District of New York, on June 26, 1951, in the case of *Smith v. United States*, 98 F.S. 1007, held that a civil service cattleman employed on a public vessel of the United States was entitled to recover a judgment under the Public Vessels Act and Suits in Admiralty Act for an injury sustained on board the vessel. It is obvious that the New York Court rightly allowed judgment, as the injured employee was not engaged in a military endeavor at the time of his injury.

In the *Lewis* case a member of the United States Park Police brought an action under the Federal Tort Claims Act for injuries he received when shot at in the course of duty pursuing fugitives. The Court therein followed the *Feres* case and found an analogy between police in line of duty and soldiers on duty and on that ground found it against public policy to allow the federal policeman to sue for such injuries. Judge Washington, who wrote the *Lewis* opinion, erroneously made the statement therein, that the Federal Employees' Compensation Act "expressly forbids them from suing the Government". Nowhere in that Act is there any such provision expressly forbidding suits by Federal employees.

By parity of reasoning Judge Washington found the federal policeman in the same category as the soldier in the *Feres* case when he said:

"The analogy to the *Feres* case is given additional strength by the fact that a member of the United States Park police, though a civilian employee, occupies a status involving a high degree of discipline and physical risk. Sound policy would seem to require—and we think that Congress has required—that employees in such positions be not relegated to a remedy in tort but rather be protected by a well defined system of compensation for the hazards of their employment."

The distinction between the *Lewis* case and the case at bar lies in the difference that Vatuone was not involved in any military risk and was not subject

to military discipline at the time of injury and death, and hence does not come under that qualification.

The decision in the *Posey* case, as stated above, is based on the provisions of the Tennessee Valley Authority Act, expressly making the Federal Employees' Compensation Act the exclusive remedy for injured employees of the Authority.

Thus, it is patently obvious that all of the cases on which the Government relies are clearly distinguishable from the case at bar, as in the *Vatuone* case there is no reason why as a matter of public policy appellee should be precluded from the pursuit of a tort action under the Public Vessels Act, as *Vatuone* was not engaged in a military operation at the time of his death.

Judge Goodman in his excellent and comprehensive decision in the *Gibbs* case (*supra*) referring to *O'Neal v. United States* (2d Cir. 1926) 11 F. (2d) 869, *Dobson v. United States* (2d Cir. 1928) 27 F. (2d) 807, and *Bradey v. United States* (2d Cir. 1945) 151 F. (2d) 742 (certiorari denied 1946, 326 U.S. 795) all dealing with injuries to naval personnel said:

“It is true that there are three cases in the Second Circuit denying *naval personnel* the right to sue under the Public Vessels Act. But those cases are, at best, merely analogous in that the remedy they hold to be the exclusive remedy available to naval personnel is that provided by the veterans' pension laws and not that accorded by the FECA. Moreover, the validity of those

decisions is now extremely doubtful in view of the Supreme Court's holding in *Brooks v. United States*, 1949, 337 U.S. 49, 69 S. Ct. 918, 920, 93 L. Ed. 1200, that there is nothing in 'the veterans' laws which provides for exclusiveness of remedy' so as to bar a suit by a serviceman under the Federal Tort Claims Act."

C. THE CONGRESSIONAL INTENT UNDER THE F.E.C.A.

In the *Mandel*, *Johansen* and *Lewis* cases the Courts, without the benefit of any of the Congressional records or debate concerning the enactment of the F.E.C.A. or its 1949 Amendment, merely assumed that the intention of Congress was that the Act was exclusive, even before Congress expressly made it so in its 1949 Amendment. A reading of the record of the Congressional debate and the statement of Senator Morse on the Amendment to F.E.C.A. in 1949 (Congressional Record of September 30, 1949—95 Congressional Record, Part 10, Pages 13608 and 13609) discloses that the purpose of the 1949 Amendment was to make the benefits more realistic in terms of present wage rates and prospectively to make the Act expressly exclusive as to federal employees, other than seamen. Congress recognized that the inadequacy of the benefits under the Act had caused federal employees to seek relief under general statutes, such as the Public Vessels Act and Suits in Admiralty Act, and wished to fill the gap between an election to sue

in tort or claim compensation by making the Act exclusive, prospectively when the new adequate compensation became applicable. The exclusive feature of the 1949 Amendment to F.E.C.A. by its terms does not apply to pending cases (5 U.S.C.A. 757) See 303(g).

The statement of Senator Morse on the subject (95 Congressional Record, Part 10, Pages 13608-13609) reads as follows:

“In the report of the Senate committee, this provision is explained as follows:

‘SEC. 201. Section 7 of the Act would be amended by designating the present language as subsection ‘(a)’ and by adding a new subsection ‘(b)’. The purpose of the latter is to make it clear that the right to compensation benefits under the act is exclusive and in place of any and all other legal liability of the United States or its instrumentalities of the kind which can be enforced by original proceeding whether administrative or judicial, in a civil action or in admiralty or by any proceeding under any other workmen’s compensation law or under any Federal tort liability statute. *Thus, an important gap in the present law would be filled* and at the same time needless and expensive litigation will be replaced with measured justice. The savings to the United States, both in damages recovered and in the expense of handling the lawsuits, should be very substantial and the employees will benefit accordingly under the Compensation Act as liberalized by this bill.

‘Workmen’s compensation laws, in general, specify that the remedy therein provided shall be the exclusive remedy. The basic theory supporting all workmen’s compensation legislation is that the remedy afforded is a substitute for the employee’s (or dependent’s) former remedy at law for damages against the employer. With the creation of corporate instrumentalities of Government and with the enactment of various statutes authorizing suits against the United States for tort, new problems have arisen. *Such statutes as the Suits in Admiralty Act, the Public Vessels Act, the Federal Tort Claims Act, and the like, authorize in general terms the bringing of civil actions for damages against the United States. The inadequacy of the benefits under the Employees’ Compensation Act has tended to cause Federal employees to seek relief under these general statutes. Similarly corporate instrumentalities created by the Congress among their powers are authorized to sue and be sued, and this, in turn, has resulted in filing of suits by employees against such instrumentalities based upon accidents in employments.*

‘This situation has been of considerable concern to all Government agencies and especially to the corporate instrumentalities. *Since the proposed remedy would afford employees and their dependents a planned and substantial protection, to permit other remedies by civil action or suits would not only be unnecessary, but would in general be uneconomical, from the standpoint of both the beneficiaries involved and the Government.*’ ”*

*Italics ours.

Congress, by its action in the 1949 Amendment, making F.E.C.A. exclusive after October 14, 1949, except as to seamen, recognized that the Act was not exclusive prior to that date. As Judge Goodman said in the Gibbs case (*supra*):

“On October 14, 1949, the Congress added subsection (b) to Section 7 of the FECA, 5 U.S.C.A. §757(b), and there provided specifically and clearly that the Act was the exclusive remedy of all employees of the United States except the masters or members of the crew of vessels. Public Law 357 81st Cong., 1st Sess. The issue of exclusiveness of remedy therefore is no longer precedentially significant. The 1949 amendments may be said to have some argumentative weight as indicative of Congressional awareness that up to *that* time the compensation statute was not the exclusive remedy of employees; or, to say the least, that there was grave doubt in the matter.”

Indeed, *Brooks v. United States*, 1949, 337 U.S. 49, 93 L. Ed. 1200, seems controlling, as the Court therein stated:

“Provisions in other statutes for disability payments to servicemen, and gratuity payments to their survivors, 38 USCA, §701, 11 FCA title 38, §701, indicate no purpose to forbid tort actions under the Tort Claims Act. Unlike the usual workman's compensations statute, e.g. 33 USCA, §905, 10 FCA title 33, §905, there is nothing in the Tort Claims Act or the veterans' laws which provides for exclusiveness of remedy. *United States v. Standard Oil Co.* 332 U.S. 301, 91 L. Ed. 2067, 67 S. Ct. 1604, indicates that,

so far as third party liability is concerned. *Nor did Congress provide for an election of remedies, as in the Federal Employees' Compensation Act, 5 USCA, §757, 2 FCA title 5, §757.*''

II.

THE NON-ACCEPTANCE OF COMPENSATION UNDER THE FEDERAL EMPLOYEES' COMPENSATION ACT DOES NOT PRECLUDE A SUIT UNDER THE PUBLIC VESSELS ACT.

Appellant claims that appellee effectively invoked a claim under the Employees' Compensation Act and is thereby barred from pursuing any claim under the Public Vessels Act. It clearly and unequivocally appears from the record that appellant *did not accept compensation payments*. Hence, she did not make an election to receive compensation rather than proceed by way of a libel under the Public Vessel Act. The facts show that the authorities at Fort Mason instituted on appellee's behalf a petition for compensation under the Federal Employees' Compensation Act, 5 U.S.C.A. 751, and informed her that she could get compensation and that she could also sue the United States for damages, but that the amount of compensation she might receive would be deducted from the amount. Appellee believed these statements to be true. Before said application had been passed upon, appellee officially requested that her application for compensation be withdrawn, because she contemplated bringing suit for damages against the United States.

This suit was commenced on *August 1, 1949*. On August 3, 1949 the Bureau of Employees' Compensation made its order awarding appellee compensation under the Federal Employees' Compensation Act. Subsequently, two compensation checks were mailed to appellee. *Appellee did not accept said checks* and sent them back to the Government with written instructions, stating that she was not accepting compensation and had elected to sue and requested that the Government send no further checks. Thereafter, no further compensation checks were ever sent to appellee and appellee has never accepted or cashed any compensation checks. Under these facts, we contend that appellee did not accept compensation and hence did not make an election to accept compensation in lieu of a suit for damages.

A case interpreting the election features of a law similar to the Compensation Act is *American Stevedores v. Porello*, 330 U.S. 446. In this case Porello, a longshoreman, was injured while working on a public vessel of the United States. Within two weeks of the accident his employer, American Stevedores, in compliance with Section 14 of the Longshoremen and Harbor Workers Compensation Act, 33 U.S.C.A., Section 900-950, began compensation payments to Porello before an award was made. He received these checks for a period of approximately six months and cashed all of them. Thereafter, he gave notice in accordance with Section 33(a) of said Act (33 U.S.C.A., Section 933(a)) of election to sue the

United States as a third party tortfeasor, rather than to receive compensation. In the same month he filed a libel to recover damages from the United States under the Public Vessels Act. The District Court held that Porello was not barred from maintaining the action before an actual award. The judgment was affirmed by the Court of Appeals. The case was then affirmed by the United States Supreme Court. The Court said:

“Congress has provided that unless an employee controverts the right of the employee to receive compensation, he must begin payments within two weeks of the injury. The employee thus receives compensation payments quite soon after his injury by force of the Act. Yet the Act does not put a time limitation upon the period during which an employee must elect to receive compensation or to sue, save the general limitation of one year upon the time to make a claim for compensation. The apparent purpose of the Act is to provide payments during the period while the employee is unable to earn, when they are sorely needed, without compelling him to give up his right to sue a third party when he is least fit to make a judgment of election. For these reasons we think that mere acceptance of compensation payments does not preclude an injured employee from thereafter electing to sue a third party tortfeasor.”

There is a distinction between our case and *Militano v. United States* (2d Cir. 1946) 156 F. (2d) 599, in that Militano not only applied for compensation under

the Federal Employees' Compensation Act (5 U.S. C.A., Section 751) but also accepted compensation under the Act. The Court held he therefore elected this remedy and could not later sue the United States. In the case at bar, appellee did not accept the compensation checks, but instead returned them to Washington to the Employees' Compensation Commission.

In *Mandel v. United States*, 74 F. Supp. 754, the Court stated:

“The Government also claims that the remedy available under the United States Employees' Compensation Act bars the libel in these two cases. However, I feel that only *actual acceptance* of compensation under this Act extinguishes the remedy sought here.”

Daln v. Davis, 258 U.S. 421, 66 L.E. 696, also holds that compensation must actually be accepted before one is precluded from his election to file suit.

III.

THE FELLOW SERVANT DOCTRINE IS NOT APPLICABLE.

The rights under the Jones Act, 46 U.S.C.A. 688 are enforceable under the Suits in Admiralty and Public Vessels Act.

In the case of *Hansen v. United States*, 12 F. (2d) 321 (S.D. Georgia 1926) it was held that in a suit brought by a seaman against the United States, under the Suits in Admiralty Act, for personal injury received on board a ship owned and operated by the

United States, that such an action is governed by the provisions of the Jones Act, and it is not a defense that the injury was caused by the negligence of an officer or fellow seaman.

The Supreme Court has held in *International Stevedoring Co. v. Haverty* (1926) 272 U.S. 50; 71 L. Ed. 157, that workmen injured in the course of their employment while working on a vessel docked in navigable waters are "seamen" under the Jones Act and therefore entitled to recover, notwithstanding the Fellow Servant Doctrine, and that the latter doctrine is abolished by the Jones Act when it incorporated the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. 51 et seq.

This same rule is followed in *Northern Coal & Dock Co. v. Strand*, 278 U.S. 142; 73 L. Ed. 232 and *Seas Shipping Co. v. Sieracki*, 328 U.S. 84; 90 L. Ed. 1099.

Vatuone, while working on a vessel in navigable waters of the United States, was hence a "seaman" with all the rights given by the Jones Act, including the abolition of the fellow servant defense.

In *Buzynski v. Luckenbach*, 277 U.S. 226; 72 L. Ed. 861, the Court said:

"And in *International Stevedoring Co. v. Haverty*, 272 U.S. 50, 52; 71 L. Ed. 157, 159, 47 S.Ct. Rep. 19, we held that the word 'seaman' as used in Sec. 33 included a stevedore engaged in the maritime work of stowing cargo upon a vessel, and that under the applicable provisions of the Employers' Liability Act, he could recover

from the stevedoring company for an injury caused by the negligence of a fellow servant."

The cases cited by appellant in the footnote on page twenty of its brief in support of its contention that the fellow servant rule applies herein are obsolete and with the exception of *Hammond Lumber Co. v. Sandin* (9th Cir. 1927) 17 F. (2d) 760, were all decided either before the enactment of the Jones Act in 1920 or before the Supreme Court decision in the *International Stevedoring Co. v. Haverty* case (*supra*) in 1926, wherein the Supreme Court stated that all workmen on vessels in navigable waters of the United States were "seamen" under the Jones Act, especially where, as in the case at bar, such duties entailed work for the benefit of the ship formerly done by crew members. The *Hammond Lumber* case cited by appellant is indeed good authority for appellee, as in that case the Ninth Circuit, through Judge Kerrigan, recognized the impact of the *International Stevedoring* case and said disposing of a contention in that case that an injured longshoreman was a fellow servant of the mate:

"but we think that the question becomes immaterial in this case, since the evidence clearly established that the negligence which caused Sandin's injuries was attributable either to the mate in the giving of his order, or to the faulty construction, by the sailors, of the sling load which collapsed, and in either case the defendant would be liable (*International Stevedoring Co. v. Haverty* (decided October 18, 1926, by the

Supreme Court of the United States) 47 S. Ct. 19; 71 L. Ed. —).”

Appellee believes it incumbent upon her to call the Court's attention to the fact that in the case at bar the Government, appellant, did not raise the fellow servant defense either in its answer or at the trial herein, and it is for that further reason precluded from raising it now.

CONCLUSION.

For the foregoing reasons, appellee respectfully submits that the judgment herein should be affirmed.

Dated, San Francisco, California,
October 15, 1951.

DANIEL V. RYAN,
THOMAS C. RYAN,
RYAN & RYAN,
ROBERT McMAHON,
Attorneys for Appellee.

No. 12910

United States
Court of Appeals
for the Ninth Circuit

CARL RUDEEN,

Appellant,

VS.

R. G. LILLY and M. M. VALENTINE, doing business under the assumed name and style of Lilly & Valentine Trucking Company,

Appellees.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

No. 12910

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CARL RUDEEN,

Appellant,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Circuit Court of the State of Oregon in and
for the County of Klamath

Equity No. 9279

R. G. LILLY and M. M. VALENTINE, doing business under the assumed name and style of Lilly & Valentine Trucking Company,
Plaintiffs,

vs.

GREAT WEST LUMBER CORPORATION, a corporation, and CARL RUDEEN, and Klamath County, Oregon, a municipal corporation;
Defendants.

COMPLAINT

Comes now the plaintiffs and for cause of suit against the defendants, and each of them, complains and alleges as follows, to-wit:

I.

That at all times mentioned herein the plaintiffs were, and they now are, doing a general hauling and trucking business in the state of Oregon, as co-partners, under the assumed name and style of Lilly & Valentine Trucking Company.

II.

That the defendant, Great West Lumber Corporation, was and it now is, a corporation organized and existing under and by virtue of the laws of the State of Oregon.

III.

That on the 4th day of August, 1948, the defendant, Great West Lumber Corporation, for value, made, executed, and delivered its promissory note in words and figures as follows, to-wit:

“\$10,000.00 Installment Note August 4th, 1948

For value received I promise to pay to the order of R. G. Lilly and M. M. Valentine Ten Thousand and No/100ths Dollars in lawful money of the United States of America, with interest thereon in like lawful money at the rate of six per cent per annum from date until paid, payable in two installments of not less than \$5,000.00 in any one payment, together with the full amount of interest due on this note at the time of payment of each installment. The first payment to be made on the 15th day of September, 1948, and a like payment on the 15th day of October, 1948, thereafter, until the whole sum, principal and interest, has been paid; if any of said installments are not so paid, the whole sum of both principal and interest to become immediately due and collectible at the option of the holder of this note. In case suit or action is instituted to collect this note, or any portion thereof, I promise to pay such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action.

Total due October 15th, 1948 at Klamath Falls, Oregon.

(Signed) Great West Lumber Corporation,
 A corporation,

By R. O. Camozzi, President and
General Manager.”

IV.

That to secure the payment of said promissory note the defendant, Great West Lumber Corporation, made, executed, and delivered a mortgage, a copy of which said mortgage is attached hereto and marked "Exhibit A" and referred to, and by said reference made a part hereof. That said mortgage was duly recorded in the office of the County Clerk of Klamath County, Oregon, on the 5th day of August, 1948, in Book 120, page 98, Records of Mortgage of said County.

V.

That said mortgage by the terms thereof provided and now does provide that the defendant, Great West Lumber Corporation, transferred to the plaintiffs herein the NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ Section 13, Township 23 South Range 9 E.W.M. and a complete saw-mill installed thereon with buildings consisting among other things as follows:

2 circular saw head rigs; edger; automatic trim saw; conveyor; conveyor chains; numerous engines and other equipment in connection therewith, as security for the payment according to the terms thereof of said promissory note;

and that said Exhibit A constituted, and now does constitute, a mortgage upon said property.

VI.

That the defendant, Great West Lumber Corporation, has wholly failed, and refused to pay said amount specified in said promissory note, and any amount thereof, except the amount of \$300.00, which

has been paid, and there is now due, owing, and unpaid to the plaintiffs from the Great West Lumber Corporation, defendant herein, the amount of \$9,-700.00, together with interest thereon at the rate of six per cent per annum from and after the said 4th day of August, 1948, until paid.

VII.

That the defendant, Carl Rudeen, claims some right, title, interest and lien in and on the property set forth in plaintiffs' Exhibit A, but that said lien and claim is, if any, inferior in time and right to the plaintiffs' lien upon said property, and that plaintiffs' lien is superior to said claim of the defendant, Carl Rudeen.

VIII.

That at the time and place of execution and delivery of promissory note and Exhibit A, it was intended to and did secure the payment of said promissory note, but because plaintiffs did not know at the time of execution of said instruments, and not knowing at this time, the exact description of the complete sawmill and equipment installed therein, plaintiffs desire the Court, when obtained, to reform the same with a full and complete description of all items of property intended and included in said lien, and a description of all the items of personal property located therein.

IX.

Said promissory note and mortgage provided, and now does provide, that in case suit or action is instituted to enforce plaintiffs' rights thereunder, that

the defendant, Great West Lumber Corporation, will pay such sum or sums as may be adjudged reasonable as attorneys fees in said suit or action by the Court, and that it has become necessary for these plaintiffs to employ an attorney to bring this action, and that the amount of \$2,500.00 is a reasonable amount to be allowed as attorney fees in said suit or action.

X.

That the property secured by said mortgage is a complete sawmill and equipment located in the northern end of Klamath County, Oregon, in an isolated area and district and is without any person to preserve and protect the property and that the defendants herein have so conducted said business of said sawmill as to cause the same to become and be totally insolvent and unable to operate the same during the forthcoming season, and the same will not be operated by the defendants, but will remain idle, unattended, and subject to vandalism and destruction, and the plaintiffs' securities will thereby be lost, impaired and destroyed.

XI.

That a receiver should be appointed to preserve said property, and do any and all things ordered by the court, and that plaintiffs herein are capable and qualified to act as receiver upon said property and it will be necessary for them to employ a caretaker to protect said property, and that the plaintiffs be authorized and directed to employ another person as caretaker to protect said property, and the whole thereof.

XII.

That at all times mentioned herein Klamath County, Oregon, was and it now is a municipal corporation and subdivision of the State of Oregon.

XIII.

That Klamath County, Oregon, claims a lien for taxes upon some, or all, of the property herein and that the validity of said lien be determined in amounts and be included in the judgment and sale of said property, and that the same be fixed in amounts and priorities.

Wherefore, plaintiffs' pray Decree of this Honorable Court as follows:

(a) Decree against Great West Lumber Corporation in the amount of \$9,700.00, with interest thereon at the rate of six per cent per annum from and after the 4th day of August, 1948, until paid; and in the further amount of \$2,500.00 as plaintiffs' attorney fees and costs of suit herein.

(b) That Exhibit A be declared to be a mortgage to secure the payment of said judgment, and that said instrument be reformed to include specific description of all personal property, included therein, and that the real and personal property be sold to satisfy said judgment.

(c) That said mortgage be declared to be prior in time and superior in and to any claim of Carl Rudeen and other persons.

(d) That the plaintiffs' herein be permitted to bid upon said property.

(e) That a receiver be appointed to preserve and protect said property and abide the order of the court in the conduct and disposition of said property.

(f) That the claim of the defendant Klamath County, Oregon, be determined and that the same be segregated and applied to specific properties, and that the liens of Klamath County, if any, which are prior to plaintiffs' lien, be paid.

(g) And for such other and further relief as to the Court may seem just and equitable.

/s/ U. S. BALENTINE,
Attorney for Plaintiffs.

“EXHIBIT A”

“This Indenture Witnesseth, that Great West Lumber Corporation, a corporation, duly incorporated, organized and existing under and by virtue of the laws of the State of Idaho and authorized to do business within the State of Oregon, with its principal office at Twin Falls, Idaho, party of the first part, for and in consideration of the sum of Ten Thousand and No/100ths (\$10,000.00) Dollars to it paid, the receipt whereof is hereby acknowledged, has bargained, sold and conveyed and by these presents does bargain, sell and convey unto R. G. Lilly and M. M. Valentine dba Lilly & Valentine Trucking Company, parties of the second part, all of the following described real estate, situate and being in the County of Klamath, State of Oregon, to-wit:

Exhibit "A"—(Continued)

NE $\frac{1}{4}$ of SE $\frac{1}{4}$ Section 13, Township 23, South Range 9 East Willamette Meridian, and a complete sawmill installed thereon with buildings consisting among other things, as follows:

2 circular saw headrakes

Edger

Automatic trim saw

Conveyors

Conveyor Chains

Numerous gas engines and other equipment in connection therewith.

together with tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining.

To Have and to Hold the same with the appurtenances unto the said R. G. Lilly and M. M. Valentine, their heirs and assigns forever.

This Conveyance is intended as a mortgage to secure the payment of the sum of Ten Thousand and No/100ths (\$10,000.00) Dollars, in accordance with the tenor of a certain instrument of writing, of which the following is a substantial copy to-wit:

“\$10,000.00 Installment Note August 4th, 1948

For value received I promise to pay to the order of R. G. Lilly and M. M. Valentine Ten Thousand and No/100ths Dollars at Klamath Falls, Oregon, in lawful money of the United States of America, with interest thereon in like lawful money at the rate of six per cent per annum from date until paid, payable in two installments of not less than \$5,000.00

Exhibit "A"—(Continued)

in any one payment, together with the full amount of interest due on this note at time of payment of each installment. The first payment to be made on the 15th day of September, 1948, and a like payment on the 15th day of October, 1948, thereafter, until the whole sum, principal and interest, has been paid; if any of said installments are not so paid, the whole sum of both principal and interest to become immediately due and collectible at the option of the holder of this note. In case suit or action is instituted to collect this note, or any portion thereof, I promise to pay such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action.

Total Due October 15th, 1948.

Great West Lumber Corporation,
a corporation,

By (signed) R. O. Camozzi

President and General Manager"

Now, if the sums of money due upon said instrument shall be paid according to agreement therein expressed, this conveyance shall be void, but in case default shall be made in payment of the principal or interest, as above provided, then the said R. G. Lilly and M. M. Valentine and their legal representatives may sell the premises above described, with all and every of the appurtenances, or any part thereof, in the manner prescribed by law, and out of the money arising from such sale, retain the said principal and interest, together with the costs and

Exhibit "A"—(Continued)

charges of making such sale, and a reasonable sum as attorney's fees, and the overplus, if any there be, paid over to the said Great West Lumber Corporation, its successors or assigns, and the said party of the first part, for itself, successors and assigns, does covenant and agree to pay to the said parties of the second part their successors or assigns the same sum of money as above mentioned.

In Witness Whereof, Great West Lumber Corporation, a corporation, party of the first part has caused its lawful corporate seal to be hereunto affixed and its name to be hereto subscribed by the hands of its president and General Manager this 4th day of August, A.D., 1948, at Portland, Oregon.

Great West Lumber Corporation,
By (signed) R. O. Camozzi
President

State of Oregon
County of Multnomah—ss.

On this 5th day of August, A.D., 1948, before me, appeared R. O. Camozzi, to me personally known, who being duly sworn, did say that he, the said R. O. Camozzi is the President, and he, the said R. O. Camozzi is the General Manager of Great West Lumber Corporation, the within named corporation, and that the seal affixed to said instrument is the corporate seal of said Corporation, and that the said instrument was signed and sealed in behalf of said Corporation by authority of its Board of Directors, and said R. O. Camozzi acknowledged said instru-

Exhibit "A"—(Continued)

ment to be the free act and deed of said Corporation.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal, this, the day and year first in this, my certificate written.

(signed) D. A. Empfield

Notary Public in and for said County and State:
My Commission Expires 8/10/51."

In the United States District Court for the
District of Oregon

Civil No. 4401

R. G. LILLY and M. M. VALENTINE, doing business under the assumed name and style of Lilly & Valentine Trucking Company,

Plaintiffs,

vs.

GREAT WEST LUMBER CORPORATION, a corporation, and CARL RUDEEN, and Klamath County, Oregon, a municipal corporation,

Defendants.

ANSWER AND CROSS-CLAIM OF
DEFENDANT CARL RUDEEN

First Defense

Defendant Carl Rudeen denies each and every allegation contained in Plaintiffs' complaint except answering Defendant admits the allegations con-

tained in Paragraphs I and XII thereof, admits that on August 4, 1948, a purported note and mortgage were given, admits that said purported mortgage was recorded, and alleges that R. O. Camozzi, who attempted to execute said purported note and mortgage on behalf of Great West Lumber Corporation, executed the same without any authority, actual or apparent, so to do. Answering Defendant further admits that he claims ownership of the real and personal property described in the complaint.

Second Defense

And indebtedness of Great West Lumber Corporation represented by said purported note has been fully paid and satisfied.

Third Defense and Cross-Claim

I.

The Plaintiffs R. G. Lilly and M. M. Valentine are residents of the State of Oregon carrying on a motor transportation business in said state under the name and style of Lilly & Valentine Trucking Company.

II.

Answering Defendant is a resident of the State of Idaho and Defendant Great West Lumber Corporation is a corporation organized and existing under and by virtue of the laws of the State of Idaho.

III.

On and prior to January 27, 1949, Defendant Great West Lumber Corporation was the owner of record of the following described real property situate in Klamath County, Oregon, to-wit:

The Northeast quarter of the Southeast quarter (NE $\frac{1}{4}$ of SE $\frac{1}{4}$) of Section 13, Township 23 South, Range 9 East of the Willamette Meridian.

IV.

On and prior to January 27, 1949, the Defendant Great West Lumber Corporation was the owner of a complete sawmill situated upon the above described real property.

V.

Defendant Great West Lumber Corporation has incurred liability for United States Internal Revenue taxes and prior to August 4, 1948, there were filed with the County Clerk of Deschutes County, Oregon, notices of liens for said unpaid taxes owing by said Defendant.

VI.

All of the personal property incorporated in the sawmill of Great West Lumber Corporation upon said described real property was physically present in Deschutes County, Oregon, after the filing of said notices of tax liens and prior to August 4, 1948, by reason whereof said tax liens attached to said personal property prior to August 4, 1948.

VII.

Thereafter and between August 4, 1948, and January 27, 1949, notices of tax liens for United States Internal Revenue taxes due from Defendant Great West Lumber Corporation were filed with the County Clerk of Klamath County, Oregon.

VIII.

Thereafter, and on January 27, 1949, pursuant to notice, said real property, together with said saw-mill, was offered for sale by the United States Internal Revenue Service to satisfy said liens for United States Internal Revenue taxes. At said sale answering Defendant Carl Rudeen was the highest bidder for said real and personal property and purchased the same, including additional personal property, for the sum of Eight Thousand 00/100ths Dollars (\$8000.00).

IX.

Answering Defendant Carl Rudeen has received certificates of purchase for said real and personal property, is the owner of said real and personal property, is entitled to the possession, and is in possession thereof, subject only to the right of redemption of Great West Lumber Corporation.

X.

On August 4, 1948, R. O. Camozzi, then general manager and president of Great West Lumber Corporation, attempted to execute and deliver to Plaintiffs, upon behalf of Great West Lumber Corporation, a promissory note and mortgage (being those referred to in the complaint) for the purpose of securing Plaintiffs upon a pre-existing indebtedness then owing from Great West Lumber Corporation to Plaintiffs. At said time and place R. O. Camozzi had no authority, actual or apparent, to make, execute or deliver any such instruments on behalf of Great West Lumber Corporation, and the

same were and are not the acts of said corporation nor in any way binding upon it.

XI.

The Plaintiffs assert that said Mortgage, Exhibit A to Plaintiffs' complaint, is a valid mortgage upon said real and personal property and that it is prior in time to answering Defendant's interest acquired upon said tax sale. Said claims constitute a cloud upon answering Defendant's title and ownership to said real and personal property which should be removed by a decree declaring said mortgage to be wholly void and of no effect.

Wherefore, answering Defendant, having fully answered Plaintiffs' complaint, prays that the same be dismissed and that answering Defendant have a decree upon his cross-claim declaring his right, title and interest in said described real and personal property acquired under said certificates of purchase to be superior and paramount in all respects to the claims of Plaintiffs and cancelling of record the pretended mortgage of the Plaintiffs and removing the same as a cloud from the title of answering Defendant to said real and personal property, and for answering Defendant's costs and disbursements herein incurred.

/s/ LEADY & KEANE,

Attorneys for Answering De-
fendant Carl Rudeen.

Service by Mail attached.

[Endorsed]: Filed April 5, 1949.

[Title of District Court and Cause.]

ANSWER TO CROSS-CLAIM

Come now the plaintiffs and for answer to defendant Carl Rudeen's third defense and cross-claim admit, deny and allege as follows, to-wit:

I.

Replying to Paragraphs I, II, III, IV, V and VII thereof, plaintiffs admits the same.

II.

Replying to Paragraph VI, plaintiffs deny the same and further replying to said Paragraph VI, allege that if any of the personal property incorporated in the sawmill of Great West Lumber Corporation was physically present in Deschutes County, Oregon, after the alleged filing of notice of tax lien, that the same was not at such time as it might have been physically present in Deschutes County, Oregon, the property of Great West Lumber Corporation, and further replying to said Paragraph VI, plaintiffs allege that said property was removed from said Deschutes County, Oregon, with the obligations on the part of the United States Government or the answering defendant, and was located in the County of Klamath, State of Oregon, for long periods of time, the extent of which is not known to these plaintiffs, and that this answering defendant is estopped from claiming a lien which attached as a result of the filing of said notices in Deschutes County if any would and did, and that these plaintiffs were permitted to rely upon the

property being in Klamath County, Oregon, and in truth and in fact prior to the execution of the mortgage searched the records of Klamath County, Oregon, to determine whether or not any prior lien existed, including those liens, if any, of the United States Government.

III.

Replying to Paragraph VIII, plaintiffs admit that on January 27, 1949, the property of the Great West Lumber Corporation was offered for sale by the United States Internal Revenue Service to satisfy liens of the United States Internal Revenue taxes, and admit that the said answering defendant, Carl Rudeen, was the highest bidder at said sale for said real and personal property, and purchased the same together with additional property for the sum of \$8,000.00 and further replying to said Paragraph VIII, plaintiffs allege that the said answering defendant, Carl Rudeen, was advised at and prior to said purchase, of plaintiffs' lien and mortgage, and bought the same subject to plaintiffs' lien and mortgage and is estopped to allege the contrary, and further replying to said Paragraph VIII, these plaintiffs allege that the said Carl Rudeen on the 27th day of January, 1949, was an officer and agent of the Great West Lumber Corporation and was a duly qualified member of the Board of Directors of said corporation and purchased said property for the use and benefit of the Great West Lumber Corporation and not otherwise, and that the lien of the United States Government thereby became, was, and now is extinguished.

IV.

And replying to Paragraph IX thereof, plaintiffs admit that said answering defendant, Carl Rudeen, has received certificates of purchase for said real and personal property, but specifically deny that the said Carl Rudeen is the owner of said property, and specifically deny that the said Carl Rudeen is entitled to the possession and allege that any possession that the said Carl Rudeen has of said property would be that of the Great West Lumber Corporation.

V.

Replying to Paragraph X, plaintiffs admit that on the 4th day of August, 1948, R. O. Camozzi was the general manager and president of the Great West Lumber Corporation and admit that he, the said R. O. Camozzi, attempted to execute and deliver to plaintiffs on behalf of the Great West Lumber Corporation a promissory note and mortgage, being those referred to in plaintiffs' complaint for the purpose of securing plaintiffs upon a pre-existing indebtedness then owing to the Great West Lumber Corporation to plaintiffs, and deny that the said R. O. Camozzi had no authority actual or apparent to make, execute and delivery any such instruments on behalf of Great West Lumber Corporation and deny that the same were or are not the said acts of said corporation, and deny that the same are not binding upon said corporation and further replying to said Paragraph X, plaintiffs allege that the said Great West Lumber Corporation, its Board of Directors, officers, agents and employees, ever since the formation of said corporation placed the said

R. O. Camozzi in complete and unlimited charge, permitting the said R. O. Camozzi to do and transact any and all business of said corporation over a long period of time at and prior to August 4, 1948, and that the said Board of Directors, officers, agents and employees of said corporation held out to the general public and to these plaintiffs that the said R. O. Camozzi was vested with full and complete authority to do and transact any and all business of said corporation, including the business of executing and delivering promissory notes and mortgages and that in truth and in fact over a long period of time the said R. O. Camozzi had dealt in real estate, purchased and sold timber, incurred indebtedness, bought and installed the plant of the defendant corporation, compromised debts and made all manner of contracts, and the said company held out to the public, including these plaintiffs, and represented to them that the said R. O. Camozzi was fully authorized to do and perform the acts alleged in these plaintiffs' complaint and all of them and that the said corporation and the answering defendant, Carl Rudeen, one of the corporation's Board of Directors, had so held out to these plaintiffs and the public in general such facts, accepted the benefits of said note and mortgage, and are now estopped from and in no proper position to deny the authority of R. O. Camozzi to execute and deliver said instrument.

XI.

Replying to Paragraph XI thereof, plaintiffs admit that plaintiffs assert that said mortgage, Exhibit

“A” to plaintiffs’ complaint, is a valid mortgage upon said real and personal property and admit that plaintiffs assert that it is prior in time to answering defendant’s interest, if any, acquired upon said tax sale and admit that plaintiffs’ claim constitutes a cloud upon answering defendant’s title and ownership, if any, to said real and personal property, but deny that said cloud should be removed by decree declaring said mortgage to be wholly void and of no effect, or in any wise.

Wherefore, plaintiffs, having fully replied to defendant’s third defense and cross-claim, pray that answering defendant Carl Rudeen take nothing thereby and that these plaintiffs have and take decree as in their complaint prayed.

/s/ U. S. BALENTINE,
/s/ HICKS, DAVIS & TONGUE,
Attorneys for Plaintiffs.

Acknowledgment of Service attached.

[Endorsed]: Filed June 7, 1949.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This case having come on regularly for pre-trial conference at Klamath Falls, Oregon, before the Honorable James Alger Fee, United States District Judge, on June 8, 1949. Plaintiffs appearing in person and by and through U. S. Balentine and Hicks, Davis, and Tongue, their attorneys. Defendant, Carl Rudeen, appearing in person and by Robert A.

Leedy of his attorneys, and Defendant, Great West Lumber Corporation appearing not and it having been stipulated that, if necessary, further proceedings may be had against said Defendant or that additional parties be brought in. The following proceedings were then and there had, to-wit:

Admitted Facts

1. That at all times involved herein plaintiffs were and now are residents of Oregon doing a general hauling and trucking business in the State of Oregon as co-partners, under the assumed name and style of Lilly and Valentine Trucking Company.

2. That at all times, until December 1, 1947, defendant Great West Lumber Corporation was a corporation organized and existing under and by virtue of the laws of the State of Idaho; that if the legal existence of said corporation was then terminated, it continued to exist as a defacto corporation during all times involved herein; that it was and now is qualified to do business in the State of Oregon as a foreign corporation and has a duly appointed attorney in fact in such state.

3. That Defendant, Great West Lumber Corporation was organized as an Idaho corporation about November 1, 1946, for the purpose of engaging in the business of manufacturing and selling lumber as expressed in its Articles of Incorporation which are designated herein as Defendant Rudeen's pre-trial Exhibit 23.

4. That the Great West Lumber Corporation en-

gaged in the operation of a sawmill in Klamath County, Oregon, as its sole operation and source of income.

5. That Defendant Great West Lumber Corporation duly adopted certain by-laws as set forth in the document designated herein as defendant Rudeen's pre-trial Exhibit 24.

6. That the stockholders and directors of Great West Lumber Corporation held certain meetings as set forth in the Minutes designated herein as Plaintiff's Exhibit 1.

7. That Great West Lumber Corporation possessed a duly adopted corporate seal, which was in the custody of its attorney at his office in the State of Idaho.

8. That during all times mentioned herein, R. O. Camozzi was the president and general manager of Great West Lumber Corporation and superintended its lumber manufacturing and selling operations.

9. That at the times mentioned, Harry W. Barry was the duly elected and acting Secretary-Treasurer of said Great West Lumber Corporation and was also a director of said corporation and as secretary of said corporation joined in the execution of some, but not all instruments executed on behalf of said corporation.

10. That at all times involved herein defendant Carl Rudeen was and is now a resident of the State of Idaho. On June 25, 1949, he became a director of Great West Lumber Corporation and now is a director of said corporation.

11. That R. O. Camozzi was the only officer or director of said corporation stationed or residing at or near its sawmill or otherwise regularly present in the State of Oregon and that all other officers and directors resided outside the State of Oregon and did not directly conduct or participate in any business transactions with any third party on behalf of Great West Lumber Corporation in Oregon.

12. That until November 15, 1948, the directors of Great West Lumber Corporation vested in R. O. Camozzi broad powers in the management of the business of said corporation and authorized him to manage the affairs of the corporation in the State of Oregon in the ordinary course of its business.

In the course of such management he had, prior to August 4, 1948, on behalf of said corporation, borrowed money from Fleishman Lumber Company, had entered into a contract with Fleishman Lumber Company to sell the entire output of the sawmill of said corporation to said concern, had directed the application of the proceeds of lumber sales to creditors of the corporation, had directed the expansion of the corporation's sawmill, had contracted for and purchased all of the sawmill equipment acquired by said corporation subsequent to its purchasing the sawmill as well as timber and real property for said corporation, had directed the operations of said sawmill and the sale of the lumber and lumber products produced by said sawmill, all with the authority of the Board of Directors of Great West Lumber Corporation.

13. That except as indicated in the Minutes desig-

nated herein as Plaintiffs' Exhibit 1 the Board of Directors of Great West Lumber Corporation held no meetings and transacted no other business, and except as indicated therein and in the By-Laws designated as Defendant's Exhibit 24, said directors exercised no direction or supervision over the activities of R. O. Camozzi as the president and general manager of said corporation, and except as indicated, therein, imposed no express limitations upon his activities in that capacity and required no other or different formal reports of such activities to the Board of Directors as such. However, some individual members of said Board of Directors did on occasion informally discuss corporate affairs with R. O. Camozzi.

13a. That certain audits were prepared of the affairs of Great West Lumber Corporation under dates of September 11, 1947 and November 20, 1948, designated herein as Plaintiffs' Pre-Trial Exhibits 2 and 3 and a certain output contract was executed by R. O. Camozzi for and on behalf of Great West with Fleishman Lumber Company designated hereing as Plaintiffs' Pre-Trial Exhibit 4.

14. That Plaintiffs were engaged by R. O. Camozzi on behalf of Great West Lumber Corp. to haul lumber from said sawmill and that as a result of said engagement, Great West Lumber Corporation became and was on July 31, 1948, indebted to Plaintiffs in the amount of \$15,134.97.

15. That on July 31, 1948, Plaintiffs filed a complaint in an action at law against Great West Lumber Corp. for the sum of \$15,134.97, plus \$1,000 in

attorneys fees, in the Circuit Court of the State of Oregon for Klamath Falls, a copy of which is referred to herein as Plaintiffs' Pre-Trial Exhibit 5. As the result of said complaint on July 31, 1948, an attachment was issued, a copy of which is included in Plaintiffs' Pre-Trial Exhibit 5. On July 31, 1948, plaintiffs also filed a complaint in a suit in equity in the same court as aforesaid, a copy of which is referred to herein as Plaintiffs' Pre-Trial Exhibit 6. As a result thereof, on July 31, 1948 a preliminary injunction was issued, a copy of which is included in Plaintiffs' Pre-Trial Exhibit 6.

16. That on or about August 4, 1948, R. O. Camozzi agreed with Plaintiffs and on behalf of Great West Lumber Corporation that the amount sued for by and under said cases should be settled in the amount of \$16,000; that cash or a promissory note should be executed in the amount of \$6,000 and a mortgage in the amount of \$10,000 upon the sawmill of Great Western Lumber Corporation.

17. That at said time there was of record a chattel mortgage given by B & C Lumber Company, to Fleishman Lumber Company covering the original sawmill which was acquired by Great West Lumber Corporation at the time of its incorporation; that the original mortgage indebtedness thereon had been paid but the mortgage had never been satisfied of record; that at Plaintiffs insistance said mortgage was satisfied of record at the time of execution of said new purported mortgage to Plaintiffs. Said mortgage and satisfaction are referred to herein as Plaintiffs' Pre-Trial Exhibits Nos. 5, 7 and 8.

18. That on or about August 4, 1948, R. O. Camozzi executed a certain Promissory Note on behalf of Great West Lumber Corporation, payable to Plaintiff in the sum of \$6,000 of which said note was endorsed for accommodation by James Fleishman, head of Fleishman Lumber Company and said note was later paid.

19. On August 4, 1948, for good and valuable consideration and for the purpose of inducing Plaintiffs to dismiss the aforesaid law action and suit in equity, R. O. Camozzi, who then and at all times involved herein was general manager and president of Defendant Great West Lumber Corporation, executed and delivered to Plaintiffs, purportedly on behalf of said corporation, a certain promissory note in the amount of \$10,000 designated herein as Plaintiffs' Pre-Trial Exhibit 9, and, as security therefor, a certain purported mortgage designated herein as Plaintiffs' Pre-Trial Exhibit 10, both for the purpose of securing Plaintiffs upon the pre-existing indebtedness aforesaid; that, acting upon the inducement of the aforesaid note and mortgage and in reliance thereon, Plaintiffs dismissed the aforesaid law action and suit in equity, together with said attachment and said preliminary injunction and said corporation was enabled to resume operations and to resume its sale of lumber and lumber products.

20. That on January 27, 1949 and since prior to August 4, 1948 Defendant, Great West Lumber Corporation was the owner of record of the following described real property in Klamath County, Oregon:

The NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 13, Township 23s., Range 9 East of the WM;

that on January 27, 1949, there was on the above described real property a complete sawmill, together with the items set forth in the notice of levy referred to herein or Defendant, Carl Rudeen's Pre-Trial Exhibit 25. That the same personal property described above was also on the above described premises on August 4, 1948, and owned by said defendant on said date, except that one of the above described motors was acquired since that date and has since been released to the seller thereof.

21. That the Board of Directors of Great West Lumber Corporation gave no express and specific authority to R. O. Camozzi to execute on behalf of the corporation the particular note and mortgage, Plaintiffs' Pre-Trial Exhibits 9 and 10.

22. That the officers and directors of Great West Lumber Corporation other than R. O. Camozzi, had no knowledge of the execution and delivery of the purported note and mortgage, Plaintiffs' Pre-Trial Exhibits 9 and 10 until on or about November 17, 1948, but that said mortgage was placed on record in Klamath County, Oregon, on or about August 6, 1948.

23. That subsequent thereto plaintiffs resumed hauling lumber for Great West Lumber Corporation and as a result thereof on October 15, 1948, said Great West Lumber Corporation owed plaintiffs a sum, the amount of which is in dispute, in addition to the sums represented by the notes and mortgage aforesaid.

24. That on October 15, 1948, plaintiffs filed a complaint in a further action at law against Great West Lumber Corporation in the aforesaid Circuit Court in the amount of \$9,013.50 together with a Notice of Attachment and affidavit, copies of which are referred to herein as Plaintiffs' Exhibit 11. As a result thereof an attachment was issued and served upon the American Lumber & Box Company of Lakeview, Oregon. A copy of said attachment is included in Plaintiffs' Pre-Trial Exhibit 11. That the sum of \$4,000 was paid to plaintiffs as a result of the aforesaid attachment.

25. By letters dated October 3 and 10, 1948, said R. O. Camozzi on behalf of Great West Lumber Corporation gave instructions to Fleishman Lumber Company to pay to plaintiffs a certain specified portion of each payment due from Fleishman Lumber Company to Great West Lumber Corporation. Said letter referred to herein as Plaintiffs' Pre-Trial Exhibit 12 a and b.

26. That between October 11, 1948 and November 13, 1948, Fleishman Lumber Company paid to plaintiffs, in accordance with the foregoing instructions, the sum of \$6,218.87, as indicated by a statement of account, a copy of which is referred to herein as Plaintiffs' Pre-Trial Exhibit 13. That on November 1, 1948 plaintiffs instructed Fleishman Lumber Company to cease further deductions from payments due to Great West Lumber Corporation by letter referred to herein as Plaintiffs' Pre-Trial Exhibit 14.

27. That no instructions were given by or on behalf of Great West Lumber Corporation to plain-

tiffs as to the manner of application of said payments.

28. That the record of dates and amounts of payments as claimed by plaintiffs is referred to Pre-Trial 15, that such records as plaintiffs have, showing the work performed for Great West Lumber Corporation on which said debt arose and to which said payments were applied are referred to herein as Plaintiffs' Pre-Trial Exhibits 16 and 17.

29. That prior to August 4, 1948, defendant Great West Lumber Corporation incurred liability to the U. S. for internal revenue taxes and there were filed with the County Clerk of Deschutes County, Oregon, notices of liens for said unpaid taxes as referred to herein in Defendant Rudeen's Pre-Trial Exhibit 26. That when said liens were filed in Deschutes County it was assumed by the United States Bureau of Internal that said sawmill was in that county, when in truth and in fact said sawmill was then located in Klamath County, Oregon.

30. That none of the above described personal property was ever in said sawmill upon the above described real property was ever physically present or at rest in Deschutes County, Oregon, in the ownership of said corporation at or after the filing of said notices of tax liens, with the possible exception of the following items as to which a controversy exists and an issue of fact has arisen, as hereinafter stated:

One double head-rig

One trim saw

One edger.

31. That on November 4, 1948, and November 20, 1948, notices of tax liens for U. S. Internal Revenue taxes due from defendant Great West Lumber Corporation were filed with the County Clerk of Klamath County, Ore., in the following amounts:

11/ 4/48—\$1,892.04

11/ 4/48— 3,922.71

11/ 4/48— 495.96

11/20/48— 4,717.15

32. Under the management of R. O. Camozzi the operations of Great West Lumber Corporation were conducted at a substantial loss. Said directors at all times until on or about November 15, 1948, believed said corporation to be solvent and its affairs to be progressing in a satisfactory manner. In fact, said corporation became insolvent by November 15, 1948, which condition of insolvency was known or should have been known to Camozzi prior to November 15, 1948, but was unknown to the other officers and directors until about that date.

33. On November 15, 1948, the directors of Great West Lumber Corporation held a meeting and adopted a resolution limiting the previous broad powers of R. O. Camozzi and appointing an Executive Committee to supervise operations, all as set forth in Plaintiffs' Exhibit 1. At the same meeting an audit was directed and was submitted under date of November 20, 1948. A copy thereof is referred to hereinabove as Plaintiffs' Pre-Trial Exhibit 2. A previous audit under date of September

11, 1947 is also referred to hereinabove as Plaintiffs' Exhibit 3.

34. That on or about December 9, 1948, the Collector of Internal Revenue for the District of Oregon, pursuant to warrants for distraint for unpaid internal revenue taxes of the Great West Lumber Corporation, levied upon all of the personal property of said corporation, including all of the personal property described in the purported mortgage, Plaintiffs' Pre-Trial Exhibit 10. A copy of said notice of levy is referred to herein as Defendants' Pre-Trial Exhibit 25.

35. That thereafter, and prior to January 27, 1949, said Collector of Internal Revenue levied upon the real property of Great West Lumber Corporation described in said purported mortgage, Plaintiffs' Pre-Trial Exhibit 10.

36. That on December 20 and 26, 1948, meetings of stockholders and directors of Great West Lumber Corporation were held for the purpose of transacting the matters set forth in Plaintiffs' Exhibit 1.

37. That on January 27, 1949, the Collector of Internal Revenue for the District of Oregon sold at public auction all of the right, title and interest of Great West Lumber Corporation in and to the personal property theretofore levied upon, including that described in said purported mortgage, Plaintiffs' Pre-Trial Exhibit 10, and all of said corporation's right, title and interest in and to the real property described in said mortgage. That Defendant, Carl Rudeen was the successful bidder for said real and personal property for the sum of \$8,000 and

said defendant has been issued and now holds certificates of sale covering said real and personal property referred to herein as Defendants' Pre-Trial Exhibits 27 and 28. That said certificates of sale purport to allocate the sum of \$7,999.00 toward the purchase of personal property and the sum of \$1.00 upon the purchase of real property. That the bid of defendant Carl Rudeen was not allocated and such allocation was made by said Collector of Internal Revenue without the authority or acquiescence of Defendant, Carl Rudeen.

38. That at the time of said tax sale the representatives of the government stated that plaintiffs held a mortgage on said property, but that there is a dispute as to what else occurred at said sale and as to the understanding of the parties at said sale.

39. After November 15, 1948, Defendant Carl Rudeen engaged in activities in connection with Great West Lumber Corporation, the nature, extent, and effect of which are in dispute. Letters written by him and telegrams exchanged are material in connection therewith and are referred to herein as Defendant Rudeen's Pre-Trial Exhibit 29, a to f.

40. An executive committee of the Board of Directors of Great West Lumber Corporation was furnished certain purported financial statements, the accuracy of which is not admitted. These statements are referred to as Defendant Rudeen's Pre-Trial Exhibit 30, a and g.

41. That it has been stipulated by and between plaintiffs and defendants Rudeen and Klamath County, Oregon, that no real property taxes are now

due and owing upon the above described real property, but that there have been assessed, and levied personal property taxes upon the above designated personal property in the sum of \$2,860.19 which have not been paid as indicated by stipulation designated as Plaintiffs' Pre-Trial Exhibit 18.

Plaintiffs' Contentions

A. On Question of Authority to Execute Mortgage

1. That under the By-Laws and the custom and practice thereunder actual authority was delegated to Camozzi to execute real estate mortgages under the circumstances of this case.

2. That Camozzi also had apparent or ostensible authority to execute such a mortgage and the corporation and its officers and directors are estopped to deny such authority.

3. That by accepting the benefits of the mortgage the corporation and its officers and directors are barred from denying such authority.

4. That defendant Rudeen is not in a proper position to raise the question of lack of authority to execute the mortgage.

5. That defendant Rudeen by his individual conduct is estopped from denying such authority.

In support of the foregoing contentions and in addition to the admitted facts above stated Plaintiffs will offer oral testimony together with the docu-

ments designated as Plaintiffs' Pre-Trial Exhibits 19, 20, 21 and 22.

B. On the Question whether the Tax Sale
Extinguish the Mortgage

1. That the tax liens were inferior to the mortgage because not filed in Klamath County until after the mortgage was filed.

2. That the tax sale was intended to be subject to said mortgage.

3. That defendant Rudeen is estopped by his official capacity and by his individual conduct from denying that said tax sale was subject to said mortgage.

In support of the foregoing contentions and in addition to the admitted facts above stated plaintiffs will offer oral testimony together with the documents referred to as Plaintiffs' Pre-Trial Exhibits 19, 20 and 21.

C. On Plaintiffs Request to Reform the
Mortgage

1. That the parties to the mortgage intended that it apply to all personal property and equipment on or at the site of the sawmill.

2. That the general language of the mortgage is reasonably subject to such interpretation and should thus be so construed.

3. That otherwise said mortgage should be reformed to reach such a result.

E. On Plaintiffs Request to Adjudicate
County Tax Liens

Based on stipulation of the parties, plaintiffs submit that the county tax liens should be adjudicated in the amount of \$2,860.19.

F. On Plaintiffs Request for a Receiver

That under the circumstances of this case a receiver should be appointed pending its final determination.

Defendant Rudeen's Contentions

1. That the purported mortgage to plaintiffs, Plaintiffs' Pre-Trial Exhibit 10, was executed by R. O. Camozzi without any authority of Great West Lumber Corporation, actual or ostensible, so to do, so that the same was not and is not a valid subsisting lien on the property therein described.

2. That defendant Rudeen is entitled to assert the invalidity of said mortgage.

3. That said mortgage is ineffective as to personal property not specifically described therein.

4. That defendant Rudeen is the legal and beneficial owner of the certificates of tax sale, Defendant Rudeen's Pre-Trial Exhibits 27 and 28, and of the property therein described subject to any existing right of redemption.

5. That plaintiffs are not entitled to a reformation of the mortgage, Plaintiffs' Pre-Trial Exhibit 10.

6. That no basis exists for the appointment of a receiver.

7. That defendant Rudeen is entitled to a decree declaring him to be the owner of the real and personal property free from any claims by plaintiffs.

In support of these contentions, defendant Rudeen will rely upon the admitted facts, upon all of the Exhibits herein referred to, and upon oral testimony to be offered upon the trial.

Issues

1. Whether R. O. Camozzi had authority, either actual or apparent, to execute the mortgage on behalf of Great West Lumber Corporation.

2. Whether Defendant Rudeen is entitled to assert that said mortgage was executed without authority.

3. Whether as to Defendant Rudeen, the mortgage is valid as to personal property not specifically described therein.

4. Whether the mortgage should be interpreted or reformed so as to include items of personal property not specifically mentioned and if so, what terms.

5. Whether Defendant Rudeen is entitled to assert priority of the interest acquired at the tax sale over the lien, if any, of the mortgage.

6. Whether the county tax liens of Klamath County should be adjudicated, and, if so, in what amount.

7. Whether a receiver should be appointed.

8. Whether a decree of foreclosure should be en-

tered in favor of plaintiffs, and, if so, what amount of attorney's fees should be included.

9. Whether a decree should be entered in favor of Defendant Rudeen declaring him to be the owner of the real and personal property free from any claim by plaintiffs.

Exhibits

The following exhibits were marked at the time of said pre-trial conference and it was stipulated and agreed that all of said exhibits may be offered in evidence by either party for what they may be worth.

Plaintiffs' Exhibits

1. Minutes of meetings of directors and stockholders.
2. Audit dated 9/11/47.
3. Audit dated 11/20/48.
4. Contract dated 10/3/47.
5. Record in Case No. 5948.
6. Record in Case No. 9060.
7. Mortgage to B. & C. Lumber Company.
8. Satisfaction of Said Mortgage.
9. Promissory Note.
10. Mortgage to Plaintiffs.
11. Record 5980L.
12. Letters from Camozzi to Fleishman Lumber Company.
13. Statement by Fleishman Lbr. Co.
14. Letter from Balentine to Fleishman Lumber Company.

15. Record of Payments to Plaintiffs.
16. Accounting Records of Plaintiff of Work Performed.
17. Accounting Records of Plaintiff of Work Performed.
18. Stipulation re County Tax Liens.
19. Deposition of Harry Barry.
20. Deposition of Defendant Rudeen.
21. Answer and Cross Claim of Defendant Rudeen.
22. Contract between Great West Lumber Corporation and Long.

Defendant's Exhibits

23. Articles of Incorporation.
24. By-Laws.
25. Notice of Tax Levies in Klamath County.
26. Summary of Notices of Tax Levies in Deschutes County.
27. Certificate of Sale of Real Property.
28. Certificate of Sale of Personal Property.
29. Letters and Telegrams written by Defendant Rudeen.
30. Financial Statements and Lists of Creditors.

The foregoing pre-trial sets forth the admitted facts, the contentions of the parties, the issues and

the exhibits. It entirely supersedes the pleadings which now pass out of the case. This order may not be amended except by consent or to prevent manifest injustice.

Dated and entered this the 8th day of June, A.D., 1949.

/s/ JAMES ALGER FEE,
United States District Judge.

Approved:

/s/ THOMAS H. TONGUE, III.,
Attorneys for Plaintiffs.

/s/ ROBERT A. LEEDY,
of Attorneys for Defendant,
Rudeen.

[Endorsed]: Filed June 8, 1949.

[Title of District Court and Cause.]

AMENDMENT TO PRE-TRIAL ORDER

This matter having come on regularly for trial before the Honorable James Alger Fee, United States District Judge, on June 8, 1949, and a pre-trial order having been entered, and it now appearing that certain issues of fact are referred to in the recital of admitted facts in said pre-trial order when in fact no such issues exist; and

It Further Appearing that said pre-trial order should be amended by consent in order to dispose of said apparent issues. Accordingly, there are agreed upon the following:

Additional Admitted Facts

1. Notwithstanding the recitals of Paragraph 23 of the admitted facts in said pre-trial order, no dispute or issue of fact exists with reference to the amount of the obligation incurred by Great West Lumber Corporation to the Plaintiffs and owing on October 15, 1948.

2. Notwithstanding the recitals contained in Paragraph 30 of the admitted facts in the pre-trial order herein, it is agreed that none of the personal property involved was ever physically present or at rest in Deschutes County, Oregon, in the ownership of Great West Lumber Corporation at or after the filing of notices of tax liens in Deschutes County, Oregon, and no controversy or issue of fact exists with reference thereto.

3. Notwithstanding the general references to the

question of payment of the obligation claimed by Plaintiffs to be secured by the mortgage, Plaintiffs' Exhibit 10, there is no dispute with reference thereto, and it is admitted that said indebtedness is unpaid and that the balance thereunder is the sum of \$9546.63.

Dated and Entered this 11th day of July, 1949.

/s/ JAMES ALGER FEE,
United States District Judge.

Approved:

/s/ THOMAS H. TONGUE, III.,
of Attorneys for Plaintiffs.

/s/ ROBERT A. LEEDY,
of Attorneys for Defendant
Rudeen.

[Endorsed]: Filed July 11, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause having come on regularly for trial on June 8, 1949, before the Court, sitting in Klamath Falls, Oregon, without a jury, plaintiffs appearing by and through U. S. Balentine and Thomas H. Tongue, III, their attorneys, defendants Great West Lumber Corporation and Klamath County, Oregon, appearing not, and defendant Carl

Rudeen appearing by and through Robert A. Leedy, his attorney, and the Court having heard the testimony and having examined the evidence offered by both parties and the cause having been submitted to the Court for decision and the Court, having considered written memoranda and oral arguments submitted by both parties and being advised in the premises, now makes findings of fact and conclusions of law as follows:

FINDINGS OF FACT

I.

That defendant Great West Lumber Corporation, an Idaho corporation, was organized on or about November 1, 1946, for the purpose of operating a saw mill in Klamath County, Oregon; that the President and General Manager of said corporation and its sole and only officer present in the State of Oregon during the times involved herein was one R. O. Camozzi; that the stockholders and directors thereof became inactive and failed to hold regular meetings or to take an active part in the affairs of said corporation or to supervise the activities of said President and General Manager, and acquiesced in all of his acts, and under the by-laws of said corporation and the custom and practice thereunder, said stockholders and directors conferred and delegated both actual and apparent authority upon its said President and General Manager to take charge of, operate, manage and control all of the affairs of the corporation in Oregon, including the operation of its

saw mill in Klamath County, and also including all things which he considered to be necessary or proper in connection therewith; that such actual and apparent authority included power to execute a certain mortgage dated August 4, 1948, to plaintiffs to secure a promissory note payable to plaintiffs under the same date, in the sum of \$10,000., of which the sum of \$9,546.63 is still due and owing on the principal thereof and that said mortgage was duly recorded in Klamath County on August 5, 1948.

II.

That at and prior to the time of the execution of said note and mortgage plaintiffs had filed suit against said corporation to recover the sum of \$15,134.97 and had secured an attachment against the lumber produced by the saw mill of said corporation and awaiting sale, and a preliminary injunction restraining all sales of lumber by said corporation; that as a result thereof the saw mill of said corporation was forced to cease operations and only resumed operations when the mortgage was executed and the attachment released and the injunction dismissed; that plaintiffs declined to release said attachment or to dismiss said injunction, unless provided with security for said obligation by way of a mortgage; that to call a meeting of the directors of said corporation at its home office in Idaho to consider said matter would have required a delay of several days; that it was not practicable to call such a meeting under the circumstances; that the President and General Manager of said corporation had

substantial reason to believe that such an emergency existed as to seriously threaten the affairs of said corporation, unless said mortgage was executed immediately and without such delay; that the execution of said mortgage was reasonably necessary to prevent substantial loss and that the execution thereof enabled said corporation to secure a release of said attachment and a dismissal of said injunction, to resume sales of lumber and to escape the danger of closing its saw mill operations and was of substantial benefit to said corporation and to its directors and stockholders.

III.

That at the time of the execution of said mortgage and immediately thereafter the directors of said corporation had reason to know of all of the facts relating thereto and an opportunity to inform themselves as to all of said facts; that thereafter and not later than November 17, 1948, the directors of said corporation at a special meeting of said directors considered the matter of the execution of said note and mortgage and neither at that time nor at any time thereafter took any action whatever to rescind or reject said mortgage or to deny that said mortgage was a duly authorized, valid and existing obligation of said corporation and the execution of said mortgage has been ratified by the directors of said corporation.

IV.

That said corporation was duly served with a copy of the complaint and summons herein and has failed

to deny any of the allegations of said complaint or to contest the entry of a decree as prayed for therein and is now in default.

V.

That defendant Rudeen was at the time of the execution of said note and mortgage and at all times thereafter a stockholder and director of said corporation; that following the execution of said mortgage and the notice thereof to the directors of said corporation, as aforesaid, defendant Rudeen undertook an attempt to reorganize the affairs of said corporation, to salvage the assets thereof and to bid upon the assets of said corporation at a sale conducted on January 27, 1949, by the Collector of Internal Revenue pursuant to warrants of distraint for unpaid federal Internal Revenue taxes levied upon the real and personal property of said corporation in Klamath County, Oregon; including the property described in the aforesaid mortgage; but that notices of tax liens for said unpaid taxes were not filed in Klamath County, Oregon, until after the recording of said mortgage.

VI.

That at said tax sale on January 27, 1949, defendant Rudeen submitted a bid of \$8,000, for the real and personal property of said corporation subject to said tax liens, which said property was originally purchased and constructed by said corporation at a cost in excess of \$200,000. and was the successful bidder at said tax sale; that prior to said tax sale

defendant had full and complete knowledge of all of the facts relating to the execution of said mortgage and with said knowledge mailed a letter dated January 6, 1949, to plaintiffs, recognizing the existence and validity of said mortgage, stating that the corporation had no funds to pay it and that the aforesaid tax sale would be subject to said mortgage; that at the time of said sale and thereafter defendant further recognized the existence and validity of said mortgage and that said sale was subject thereto; that plaintiffs had reason to and did rely upon the aforesaid conduct and representations of defendant Rudeen and that said defendant Rudeen was not an innocent or bona fide purchaser and that said defendant Rudeen is estopped thereby to deny the validity of said mortgage and that said tax sale was subject to said mortgage.

VII.

That the aforesaid mortgage was intended to and did cover the N.E. $\frac{1}{4}$ of the S.E. $\frac{1}{4}$ of Sec. 13, T. 23 S., Range 9, E. of the W.M., together with a complete saw mill situate thereon, which said real property is described and covered by said mortgage and that said mortgage covers the following items of saw mill equipment:

Hercules 3 KW Generators; 1 Koehler $1\frac{1}{2}$ KW Generator;

U. S. Army Sig. Corps $1\frac{1}{2}$ KW Gen. Motor No. 63655 Model 1 M 21-A;

140 H.P. Hercules Motor, Model ZXB Motor No. 315987-3 DW;

1 Model HXE 6 Cyl. Motor Stand and Transmission No. 327206;

120 H.P. Red Seal R-6-02-1040 Gas Motor with twin disc clutch;

35 H.P. Red Seal F226 Clutch C-103124, Spec. No. 18557, P.A. 244-302;

Hercules Motor 95 H.P. Model RXLD 137290 (6 Cyl.);

Convey Motor, 35 H.P. Red Seal F 266;

Red Seal 55 H.P. M 290-425 Twin Disc Clutch for log haul;

Log Haul Chain and equipment;

Green chain motor;

Log Haul chain and equipment;

Chrysler Industrial 8 Cyl. Motor C-36, Ind. -9-99 Serial No. 7990—Automotive Clutch;

Continental Red Seal No. F 162-29341 and Clutch;

Air Cool Wisconsin 22 H.P. Model V.E. 4 Serial No. 869394 Specification No. 36756;

Wisco 6 H.P. Motor, Air cool;

2—350 Gal. water pumps, 1 stationary, 1 portable;

45 H.P. Gas Motor Jammer for Log Haul;

Small Head Rig and Carriage;

Big Head Rig and Carriage;

Edger;

Trim Saw;

Waste Conveyor;

2 Lath Machines;

Green chain; capacity 80,000 ft.;
2 Boilers, Straw Burners;
Steam Rigger;
1 Double Head;
1 Single Head;
Saws and Filing Equipment;
Aluminum covered mill building, approx. 60x120 feet;
120 H.P. Red Seal R-6-02-3602 Gas Motor with twin disc clutch.

VIII.

That it has been stipulated by and between plaintiffs and defendant Rudeen and Klamath County, Oregon, that no real property taxes are due and owing upon the above described real property, but that there has been assessed and levied personal property tax in the sum of \$3,369.32 which have not been paid.

IX.

That a reasonable sum to be allowed as attorneys' fees to attorneys for plaintiffs in view of the nature of this cause, the amount of money and property involved, the nature of the legal issues, the time involved in the investigation of the case, preparation of pleadings, taking of depositions, pre-trial, preparation for trial, trial, the preparation of memorandum briefs and for oral argument and in the preparation of proposed findings of fact and conclusions of law, and in consideration of the testimony submitted as to the reasonable value of said services is the sum of \$1,250.00.

CONCLUSIONS OF LAW

I.

That there was both actual and apparent authority for the execution by the President and General Manager of defendant Great West Lumber Corporation of the mortgage on behalf of said corporation, dated August 4, 1948, in favor of plaintiffs herein.

II.

That the stockholders and directors of said corporation subsequently ratified the execution of said mortgage and are estopped from denying the validity thereof.

III.

That an order of default herein should be entered against defendant Great West Lumber Corporation.

IV.

That defendant Rudeen has not established that his alleged purchase of the property involved herein at the tax sale of January 27, 1949, was a bona fide transaction or by an innocent purchaser, or for an adequate consideration, and that defendant Rudeen was not an innocent or bona fide purchaser and is likewise estopped from and not in a position to deny the validity of said mortgage.

V.

That said mortgage is a valid and subsisting lien upon the properties described herein and is prior in time and superior to any claim of defendant Rudeen or of or on behalf of said corporation.

VI.

That plaintiffs are entitled to have said mortgage foreclosed and the property hereinabove described sold in the manner prescribed by law, and the proceeds from such sale applied to the payment of monies due as aforesaid; that is to say, that plaintiffs recover the sum of \$9,546.63 and also the sum of \$1,250.00 for attorneys' fees, together with plaintiffs' costs herein, with interest at the rate of six per cent per annum until paid, and the charges of said sale.

VII.

That said property be sold according to law by an official to be appointed by this Court, and the proceeds applied to the payment of the amount due on said promissory note and mortgage, with interest, disbursements and attorneys' fees; that plaintiffs and any other parties to this action may become a purchaser at the sale of said property; and that the property ordered to be sold as aforesaid is as described in Paragraph VII of the Findings of Fact herein.

VIII.

That personal property taxes in the amount of \$3,369.32 are due and owing on said property to Klamath County, Oregon.

Dated this 19th day of February, 1950.

/s/ JAMES ALGER FEE,

United States District Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed February 19, 1951.

In the United States District Court for the
District of Oregon

Civil No. 4401

R. G. LILLY and M. M. VALENTINE, doing business under the assumed name and style of Lilly & Valentine Trucking Company,

Plaintiffs,

vs.

GREAT WEST LUMBER CORPORATION, a corporation, and CARL RUDEEN, and KLAMATH COUNTY, OREGON, a municipal corporation,

Defendants.

DECREE OF FORECLOSURE AND ORDER
OF SALE

The above entitled cause having come on regularly for trial on June 8, 1949, before the Court sitting in Klamath Falls, Oregon, without a jury, plaintiffs appearing by and through U. S. Balentine and Thomas H. Tongue, III, their attorneys, defendant Klamath County, Oregon, appearing not, and defendant Great West Lumber Corporation appearing not, and an order of default having been entered against said defendant, and defendant Carl Rudeen appearing by and through Robert A. Leedy, his attorney, and the Court having heard the testimony and having examined the evidence offered by both parties, and the cause having been submitted to the

Court for decision and the Court, having considered written memoranda and oral arguments submitted by both parties and having made and caused to be filed herein its Findings of Fact and Conclusions of Law; Now, Therefore;

It Is Ordered, Adjudged and Decreed as follows:

(1) That plaintiffs have judgment against defendant Great West Lumber Corporation in the sum of \$9,546.63, with interest thereon at the rate of 6 per cent per annum from August 4, 1948, until paid, together with attorneys' fees in the sum of \$1,250.00, and such costs and disbursements as may be taxed, with interest at 6 per cent per annum from the date hereof until payment thereof.

(2) That the mortgage dated August 4, 1948, under which plaintiffs were named as mortgagees and defendant Great West Lumber Corporation was named as mortgagor, shall be foreclosed as provided by law and as hereinafter directed.

(3) That pursuant to said foreclosure the property hereinafter described shall be sold at public auction according to law and that plaintiffs or any of the parties to this suit may purchase at said sale;

(4) That said sale shall be made at public auction, for cash, by the United States Marshal hereinafter designated; that out of the proceeds of said sale said Marshal retain his fees and disbursements on said sale, pay to Klamath County, Oregon, for taxes the sum of \$3,369.32, pay to the plaintiffs or their attorneys out of said proceeds such costs and disbursements as may be allowed herein, and the sum

of One Thousand Two Hundred-Fifty Dollars (\$1,250.00) allowed by this Court as attorneys' fees, with interest thereon at the rate of six per cent per annum from the date hereof until paid, and the sum of \$9,546.63, with interest thereon at the rate of six per cent per annum from August 4, 1948 until paid, or so much thereof as said sale proceeds permit; and that said Marshal take and return to this Court receipts for the amounts so paid, to be presented to this Court, together with his return and report of sale, and any surplus monies which may remain after applying the proceeds of sale as aforesaid within ten (10) days after making said sale; said surplus, if any there be, to abide the further order of this Court.

(5) That the defendants and all persons claiming from and under them be and they are hereby forever barred and foreclosed of and from all equity of redemption and a claim in or to said property, and all parts thereof, except such right of redemption as they may have by law from said sale, and Jack R. Canfield, United States Marshal, is hereby appointed to conduct said sale, the fees prescribed by statute being hereby fixed and allowed said United States Marshal as and for reasonable compensation for his services in that behalf.

(6) The property hereinabove referred to consists of the N.E. $\frac{1}{4}$ of the S.E. $\frac{1}{4}$ of Sec. 13, Township 23 S., Range 9, E. of the W.M., together with a complete saw mill situate thereon and including the following items of saw mill equipment:

Hercules 3 KW Generators; 1 Koehler 1½ KW Generator;

U. S. Army Sign. Corps 1½ KW Gen. Motor No. 63655 Model 1 M 21-A;

140 HP Hercules Motor, Model ZXB Motor No. 315987-3 KW;

1 Model HXE 6 Cyl. Motor Stand and transmission No. 327206;

120 HP Red Seal R-6-02-3602 Gas Motor with twin disc clutch;

120 HP Red Seal R-6-02-1040 Gas Motor with twin disc clutch;

35 HP Red Seal F226 Clutch C-103124, Specification No. 18557, P.A. 244-302;

Hercules Motor 95 HP Model RXLD 137290 (6 Cyl.);

Convey Motor, 35 HP Red Seal F 266;

Red Seal 55 HP M 290-425 Twin Disc Clutch for log haul;

Log Haul chain and equipment;

Chrysler Industrial 8 Cyl. Motor C-36, Ind. -9-99 Serial No. 7990—Automotive Clutch;

Green chain motor;

Continental Red Seal No. F 162-29341 and Clutch;

Air Cool Wisconsin 22 HP Model V.E. 4 Serial No. 869394 Specification No. 36756;

Wisco 6 HP Motor, Air cool;

2—350 Gal. water pumps, 1 stationary, 1 portable;

45 HP Gas Motor Jammer for Log Haul;

Small Head Rig and Carriage;

Big Head Rig and Carriage;

Edger;

Trim Saw;

Waste Conveyor;

2 Lath Machines;

Green chain, capacity, 80,000 ft.;

2 Boilers, Straw Burners;

Steam Rigger;

1 Double Head;

1 Single Head;

Saws and Filing Equipment;

Aluminum covered mill building, approx. 60x120 feet.

Dated this 19th day of February, 1951.

/s/ JAMES ALGER FEE,
U. S. District Judge.

[Endorsed]: Filed February 19, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS

To R. G. Lilly and M. M. Valentine, Plaintiffs, and
Hicks, Davis & Tongue and U. S. Balentine,
their attorneys:

Notice is hereby given that Carl Rudeen, one of
the Defendants above named, hereby appeals to the
Circuit Court of Appeals for the Ninth Circuit from

the final judgment and decree entered herein on February 19, 1951.

/s/ ROBERT A. LEEDY,
BARZEE, LEEDY & KEANE,
Attorneys for Appellant Carl
Rudeen.

Acknowledgment of Service attached.

[Endorsed]: Filed March 21, 1951.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents: That

Whereas, Carl Rudeen, one of the Defendants above named, has given notice of appeal to the Circuit Court of Appeals for the Ninth Circuit from the judgment and decree made and entered herein on February 19, 1951:

Now, Therefore, United Pacific Insurance Company, a surety company qualified to do business in the District of Oregon, is by these presents firmly bound unto the Plaintiffs above named in the sum of Two Hundred Fifty 00/100ths Dollars (\$250.00).

The condition of this obligation is such that if Carl Rudeen, said Appellant, shall pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the appellate court may award if the

judgment is modified, then this obligation shall be void, but otherwise in full force and effect.

Dated this 21st day of March, 1951.

[Seal] UNITED PACIFIC INSURANCE
COMPANY,

Surety

/s/ By EDWARD T. LYNCH,
Attorney-in-fact.

Acknowledgment of Service attached.

[Endorsed]: Filed March 21, 1951.

— — —

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Comes now Carl Rudeen, Defendant-Appellant herein, and states that the points on which he intends to rely on the appeal are as follows:

1. The evidence is insufficient to support the findings of fact.
2. The findings of fact are clearly erroneous.
3. The evidence will support only findings of fact leading to conclusions of law requiring a decree for this Defendant in accordance with his contentions herein.

/s/ ROBERT A. LEEDY,

Of Attorneys for Defendant-Appellant Carl Rudeen.

Acknowledgment of Service attached.

[Endorsed]: Filed April 3, 1951.

[Title of District Court and Cause.]

ORDER FOR TRANSMISSION OF EXHIBITS

This matter coming before the Court upon the motion of Defendant-Appellant Carl Rudeen for an order directing the Clerk of this Court to transmit the exhibits herein to the appellate court, and the parties having stipulated through their attorneys of record that an order may enter for the transmission of said exhibits; now, therefore, it is hereby

Ordered that the Clerk of this Court be and he is hereby directed to transmit to the United States Circuit Court of Appeals for the Ninth Circuit all of the exhibits introduced in evidence herein, being numbered 1 to 30, inclusive, as described in the stipulation of the parties herein designating the record upon appeal.

Dated and entered this 16th day of April, 1951.

/s/ JAMES ALGER FEE,
Judge.

[Endorsed]: Filed April 16, 1951.

[Title of District Court and Cause.]

STIPULATION DESIGNATING RECORD UPON APPEAL

It Is Hereby Stipulated and Agreed by and between the Plaintiffs, through their attorneys of record, and the appealing Defendant, Carl Rudeen, through his attorneys of record, that the portions of the record, proceedings and evidence herein to be

included in the record on appeal shall be as follows:

Final judgment and decree;

Complaint;

Answer and cross-claim of Defendant Carl Rudeen;

Answer to cross-claim;

Pre-trial order;

Amendment to pre-trial order;

Findings of fact and conclusions of law;

Transcript of testimony;

All exhibits (numbered 1 to 30, inclusive);

Notice of appeal;

Bond on appeal.

Dated this 28th day of March, 1951.

/s/ THOMAS H. TONGUE, III.

Of Attorneys for Plaintiffs.

/s/ ROBERT A. LEEDY,

Of Attorneys for Appealing Defendant Carl Rudeen.

[Endorsed]: Filed April 3, 1951.

[Title of District Court and Cause.]

DOCKET ENTRIES

1949

Mar. 28—Filed petition for removal from Klamath County, Oregon.

Mar. 28—Filed bond of Carl Rudeen, petitioner.

Mar. 30—Filed notice of removal.

1949

- Apr. 5—Filed answer and cross-claim of deft. Carl Rudeen.
- Apr. 18—Entered order setting for pre-trial conference May 31, 1949. Fee.
- Apr. 20—Filed appearance of Hicks, Davis & Tongue, Edwin D. Hicks and William Hale, as attys. for pltf.
- Apr. 26—Filed motion for order for service by C. L. McCauley.
- Apr. 26—Filed and entered order for service by C. L. McCauley.
- Apr. 26—Filed praecipe of W. M. Davis for issuance of summons on Great West Lumber Corp.
- Apr. 27—Mailed summons to C. L. McCauley for service on Great West Lumber Corp.
- Apr. 29—Filed summons with return.
- May 13—At Pendleton: Set for P.T.C. June 7, trial June 8, 1949, at Klamath Falls. Fee.
- Jun. 7—At Klamath Falls: Entered order setting for pre-trial conference June 8, 1949. Fee.
- Jun. 7—At Klamath Falls: Filed answer to cross claim.
- Jun. 8—At Klamath Falls: Filed and entered pre-trial order.
- Jun. 8—At Klamath Falls: Record of trial before the Court, order allowing plffs 2 wks, deft. 2 wks thereafter and plffs 2 wks thereafter to file briefs. Fee.
- Jun. 17—Filed exhibits: Plffs 1 to 22; Deft. Rudeen 23 to 30 c.

1949

Jun. 27—Filed plaintiffs' motion for extension of time to file memorandum.

July 6—Filed transcript of testimony.

July 11—Filed and entered order allowing plaintiff to June 27, 1949 to file brief. Fee.

July 11—Filed plaintiffs' brief.

July 11—Filed and entered amendment to pre-trial order. Fee.

July 11—Filed motion of deft. Rudeen for extension of time to file brief.

July 11—Filed and entered order allowing deft. Rudeen to July 18, 1949 to file brief. Fee.

July 18—Filed brief of deft. Rudeen.

Aug. 1—Filed plaintiffs reply memorandum.

Aug. 1—Filed transcript of testimony June 8, 1949.

1950

Jan. 6—Entered order setting cause for final argument on Jan. 23, 1950 at 2 p.m. Fee.

Jan. 23—Record of trial (submitted). Fee.

Apr. 3—Record of opinion. Fee.

May 12—Filed motion for order of default as to Great West Lumber Corporation.

May 12—Filed stipulation as to amount of taxes due Klamath County.

May 22—Filed objections to proposed findings and conclusions.

May 22—Filed requested findings and conclusions of defendant Carl Rudeen and proposed amendments to findings and conclusions.

1951

Feb. 5—Entered order setting for hearing on objections to findings for Feb. 9, 1951. Fee.

1951

Feb. 9—Record of hearing on objections to findings.
Fee.

Feb. 9—Filed and entered order of default as to
Great West Lumber Corporation. Fee.

Feb. 19—Filed stipulation re taxes due.

Feb. 19—Filed and entered findings of fact and con-
clusions of law. Fee.

Feb. 19—Filed and entered judgment. Fee.

Feb. 24—Entered judgment in lien docket.

Mar. 21—Filed notice of appeal by deft. Carl Ru-
deen.

Mar. 21—Filed bond on appeal.

Apr. 3—Filed stipulation designating record upon
appeal.

Apr. 3—Filed statement of points on appeal.

Apr. 12—Filed motion for order for Clerk to send
exhibits.

Apr. 12—Filed stipulation for Clerk to send exhibits.

Apr. 16—Filed and entered order for Clerk to send
exhibits. Fee.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States
District Court for the District of Oregon, do hereby
certify that the foregoing documents consisting of
complaint, answer and cross-claim of Carl Rudeen,

Answer to cross-claim, pre-trial order, amendment to pre-trial order, findings of fact and conclusions of law, decree of foreclosure and order of sale, notice of appeal, cost bond on appeal, statement of points on appeal, order for transmission of exhibits, designation of record on appeal, and transcript of docket entries, constitute the record on appeal from a decree of said court in a cause therein numbered Civil 4401, in which R. G. Lilly and M. M. Valentine, doing business under the assumed name and style of Lilly & Valentine Trucking Company, are plaintiffs and appellees, and Carl Rudeen is defendant and appellant; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith duplicate transcript of testimony dated June 8, 1949 filed in this office in this cause, together with exhibits Nos. 1 to 3 inclusive, 5 to 15 inclusive, 18 to 25 inclusive, 27 to 30-c inclusive.

I further certify that the cost of filing notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 23rd day of April, 1951.

[Seal]

LOWELL MUNDORFF,
Clerk.

/s/ By F. L. BUCK,
Chief Deputy.

In the United States District Court for the
District of Oregon

Civil No. 4401

R. G. LILLY and M. M. VALENTINE, doing business under the assumed name and style of Lilly & Valentine Trucking Company,
Plaintiffs,

vs.

GREAT WEST LUMBER CORPORATION, a corporation, and CARL RUDEEN, and KLAMATH COUNTY, OREGON, a municipal corporation,
Defendants.

Before:

Honorable James Alger Fee, Judge.

Appearances:

Mr. Thomas H. Tongue, III, and Mr. U. S. Balentine, of attorneys for plaintiffs.

Mr. Robert A. Leedy, of attorneys for defendant Carl Rudeen.

TRANSCRIPT OF TESTIMONY

Klamath Falls, Oregon, June 8, 1949

Mr. Tongue: If your Honor please, there are two or three preliminary matters, if we may proceed with those things.

The Court: Yes.

Mr. Tongue: I might say that all of the pre-trial exhibits have been marked, and at this time, pursuant to stipulation, we will submit on behalf of the plain-

tiff all of the pre-trial exhibits marked for identification and listed in the pre-trial order as plaintiffs' pre-trial exhibits.

Mr. Leedy: There is no objection to their admission in evidence. The defendant also wishes at this time to offer the pre-trial exhibits marked for the defendant.

The Court: All exhibits are received by consent.

(The documents heretofore marked as Plaintiffs' Pre-Trial exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 (A and B), 13, 14, 15, 18, 19, 21 and 22, were thereupon received in evidence; and the documents heretofore marked as Defendant Rudeen's pre-trial exhibits 23, 24, 25, 27, 28, 29 (A to F), and 30 (A to C), were received in evidence.)

Mr. Tongue: One other matter before we proceed, your Honor. The drafting of this pre-trial order, as the Court can understand from its length, took some little time. At the beginning of its preparation, at the beginning of the drafting of the statement of admitted facts, we were assuming that there would be certain [2*] issues that, when we completed the order, were eliminated. Now, there are certain references under the admitted facts from which it may appear that there is a dispute between the parties as to whether this mortgage has been paid. That issue, however, has been eliminated and is no longer an issue in the case, and I wanted to clarify the rec-

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

ord on that point. Is that correct, Mr. Leedy?

Mr. Leedy: Yes, that is correct, Mr. Tongue. The pre-trial order in stating the contentions of the parties and issues makes no reference to the matter of payment, and the issues are correctly defined in the order itself.

Mr. Tongue: There is one other matter that I might call your Honor's attention to in that same regard which may otherwise lead to some misunderstanding. At the time of the beginning of these negotiations it appeared that there would be a further contention on the part of the Defendant Rudeen that some of the personal property secured by the mortgage, or specified in the mortgage, was in Deschutes County at the time or after the filing of the Government tax liens in that county, with the result that it was then expected that the Defendant Rudeen would contend that the mortgage was not prior to the tax lien as to any such items of personal property. There again I think it is understood that that contention is withdrawn and there is no issue on that matter. Is that right, Mr. Leedy?

Mr. Leedy: I think again, Mr. Tongue, it is a matter that [3] the pre-trial order correctly states the contentions and the issues, and there is no such contention or issue made and therefore it is not in the case.

Mr. Tongue: I just wanted to make that clear.

The Court: That is, as to the presence of personal property in Deschutes County?

Mr. Tongue: In Deschutes County, yes. That is, there is no issue arising out of the conflict between

the mortgage and the tax liens, which is one of the issues in the case.

The Court: I think we should have an amendment of the pre-trial order stating that, stating that there is no issue on that.

Mr. Tongue: They are not stated as issues, your Honor, nor are they stated——

The Court: If it is important enough to make a point of here it is important enough to put it in the pre-trial order.

Mr. Tongue: Very well.

The Court: You can agree that there is no issue on these matters, and you can state it and put it in the pre-trial order.

Mr. Tongue: Very well. Is it your Honor's pleasure that we proceed and then make those amendments later, or do you want to wait until those changes are made?

The Court: No, we will go right ahead. The pre-trial order will be amended in that respect.

Mr. Tongue: May I call my first witness?

The Court: Yes. [4]

MARION M. VALENTINE

one of the plaintiffs herein, was thereupon produced as a witness in behalf of plaintiffs and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tongue:

Q. Would you please state your name and your business, Mr. Valentine.

(Testimony of Marion M. Valentine.)

A. Marion M. Valentine, lumber hauler.

Q. Are you engaged in business in partnership with any person? A. Yes; Mr. Lilly.

Q. Under what name are you engaged in business?

A. Lilly & Valentine Trucking Company.

Q. How many trucks do you have for the purpose of conducting that business?

A. Nine trucks and a four-wheel trailer.

Q. How many employees do you have?

A. I have nine.

Q. Now, at any time did you haul lumber for the Great West Lumber Company?

A. At what time?

Q. At any time. A. 1947 to 1948.

Q. At the end of July of 1948 did that company owe you any money for the hauling of lumber? [5]

A. Yes, they did.

Mr. Tongue: By the way, that is stipulated to be in the amount of \$15,134.

The Witness: That is correct.

Mr. Tongue: Is that correct, Counsel?

Mr. Leedy: It is all in the pre-trial order, Mr. Tongue.

Mr. Tongue: What did you then do, Mr. Valentine?

A. I went to Mr. Balentine there, attorney.

Q. As the result of your conference with Mr. Balentine were certain legal proceedings instituted?

A. That is right.

Q. After those proceedings were instituted were

(Testimony of Marion M. Valentine.)

you contacted by anyone on behalf of Great West Lumber Company? A. Camozzi.

Q. Who was Mr. Camozzi, if you know?

A. He was the president and general manager.

Q. Did he come to see you?

A. Yes, he come up to Balentine's office.

Q. Was any understanding or agreement reached between you and Mr. Camozzi at that time?

A. You mean at that day?

Q. Yes, or as the result of those negotiations?

A. Well, yes. We was to settle——

Mr. Leedy: Just a moment, now. If the Court please, of course we object to the conclusion of the witness as to what his [6] agreement was.

The Court: You may testify to what each of you said.

Mr. Tongue: Mr. Leedy, we are content to rest on the statement in the pre-trial order under the admitted facts, Paragraph 16, as to those terms of the agreement that were reflected in that paragraph.

Mr. Leedy: I assumed that was the purpose of the agreement, to eliminate the necessity of testimony.

Mr. Tongue: Q. Now, Mr. Valentine, was there any discussion at that time as to the execution of a mortgage on behalf of the Great West Lumber Company to Lilly & Valentine? A. Yes.

Q. What was said by Mr. Camozzi, if anything, on that point?

A. Well, he made some phone calls, and he was to give us a \$10,000 mortgage and a \$6,000 note.

Q. Was there any discussion with Mr. Camozzi

(Testimony of Marion M. Valentine.)

as to the items of equipment or personal property that were to be covered by that mortgage?

A. There was to be one complete sawmill and the land.

Q. One complete sawmill and the land; is that what you said? A. That is right.

Q. Was there any discussion of whether the various items of equipment included in the sawmill should be specified in the mortgage?

A. No, it was an automatic trim saw, a planer, and numerous [7] motors and chains.

Q. Did you know at that time all of the items of personal property at the sawmill?

A. I did not.

Q. Will you say "Yes" or "No." The Reporter doesn't get it when you shake your head.

A. No.

Q. Where was the sawmill located in reference to Klamath Falls?

A. About 100 miles north of Klamath Falls.

Q. Was there any reason at that time why Mr. Camozzi was anxious to have this matter expedited and the mortgage executed as quickly as possible?

Mr. Leedy: Objected to as calling for a conclusion of the witness.

Mr. Tongue: I will withdraw the question.

Q. Did Mr. Camozzi state that he was anxious to have the mortgage executed at any particular date?

Mr. Leedy: Objected to as leading and calling for an assumption.

(Testimony of Marion M. Valentine.)

The Court: Yes.

Mr. Tongue: Q. Did Mr. Camozzi make any statement as to when he wanted the mortgage executed?

A. The mortgage was due within sixty days.

Q. I am referring to the original execution of the mortgage and the discussions leading to its execution. My question is [8] whether Mr. Camozzi said anything and, if so, what he said, as to when he wanted this matter concluded. Did he say that there was any reason why he wanted the mortgage executed and the matter settled as soon as possible?

A. That is right; he did.

Q. What did he say?

A. Well, he said he wanted me to come right down. He wanted to settle right away.

Q. Was a preliminary injunction then issued by the Court restraining the sale of lumber by the company?

A. That is right; there was.

Q. Was there any discussion of that restraining order as a reason for expediting the settlement of this matter?

A. Yes.

Q. Was that discussed as one of the reasons for not going to the mill and getting a list of the property in detail?

A. That is right.

Q. What was your understanding and intent, if you had any such understanding or intent, as to what items of personal property were to be included under this mortgage?

Mr. Leedy: If the Court please, I deem that objectionable as calling for the intent. It is not material

(Testimony of Marion M. Valentine.)

what his inner intent may have been. It is what was said and done on that occasion.

Mr. Tongue: Your Honor, it is my contention that the intention [9] of both parties as to the items to be covered by the mortgage is material on the issue of the interpretation to be given to the mortgage and also on the issue of reformation, which is one of the issues in this case.

The Court: Objection sustained. It is the intention of the parties as expressed. If the mortgage was incorrectly drawn, it must be shown to have been incorrectly drawn from definite statements that were made to the scrivener.

Mr. Tongue: To whom?

The Court: To the scrivener; to the person who drew it.

Mr. Tongue: We don't claim that it was mistakenly drawn. It is just a question, primarily, of interpretation, your Honor, which according to our position rests on the intent.

The Court: That might be, but then the interpretation of a written document is based upon the writing.

Mr. Tongue: Very well.

Q. Mr. Valentine, you have testified that Mr. Camozzi, according to your understanding, was the president and general manager of the corporation; is that right? A. Yes, sir.

Q. Had you been around the sawmill on any occasions? A. Several occasions, yes.

Q. Did you ever have occasion to observe to whom

(Testimony of Marion M. Valentine.)

questions were referred for orders or directions?

A. Mr. Camozzi. [10]

Q. Did you ever see anyone at the mill who was or was represented to be an officer or director of the corporation other than Mr. Camozzi?

A. No, sir.

Q. From your observation, in your dealings with the Great West Lumber Company who appeared to be in charge of the operation?

A. Mr. Camozzi.

Q. Do you have any personal knowledge as to whether or not Mr. Camozzi purchased the sawmill equipment that was installed in the mill after the Great West Lumber Company took over the mill?

A. I have not.

Q. Did Mr. Camozzi in his dealings with you ever refer to any other person or source for authority to make the—to make any decision?

A. No, sir.

Q. Did he ever make any statement to you that he had full authority?

Mr. Leedy: That is objected to, your Honor. You can't prove the authority of an agent by the extra judicial utterances of the agent.

Mr. Tongue: There is some question whether that goes to the question of apparent authority or estoppel, your Honor.

The Court: I think he may answer that.

Mr. Tongue: Would you restate the question?

(Last question read.)

A. Yes.

(Testimony of Marion M. Valentine.)

Q. What did he say, if anything?

A. He says, "I am the big shot around here." He mentioned that several times.

Q. I assume that after these conversations that you have recited with Mr. Camozzi there was what purported to be a mortgage executed by him to you; is that right?

A. That is right.

Q. Did your firm do any further hauling for the Great West Lumber Company after that date?

A. After the mortgage?

Q. Yes.

A. Yes, he asked us to continue hauling.

Q. And that was on about what date, if you remember?

A. I am not sure. It was after——

Q. Does it refresh your recollection if I tell you that the mortgage was executed on August 4th, 1948, according to the stipulation of the parties?

A. Right after the mortgage we started hauling again.

Q. Were you paid promptly for the further hauling that you performed for the company?

A. No, sir.

Q. Did you have any discussions with Mr. Camozzi as to the question of payment for this further work? [12]

A. Yes. When we continued hauling for him we told him if he would keep the payments up for hauling, why, we would continue hauling for him.

Q. Was there any discussion of payments due on the mortgage in that connection?

(Testimony of Marion M. Valentine.)

A. We told him we would let the mortgage ride the way it was until he paid up his current bills.

Q. At that time did you assume that the mortgage was a good and valid obligation of the company?

Mr. Leedy: That will be objected to, your Honor.

The Court: Objection sustained.

Mr. Tongue: Your Honor, may I make this one statement? I will make it brief. One of the contentions of the plaintiffs in this case is that the defendants not only retained the benefits of the mortgage but by their conduct are estopped from questioning the authority to execute the mortgage, and in that connection we submit that it is material to show that the plaintiffs relied on the validity of that mortgage.

The Court: That is not conduct of this particular defendant, as I understand it. This Defendant Rudeen had nothing to do with that.

Mr. Tongue: No. It is not conduct of his; that is right.

The Court: That is the basis of estoppel, is his conduct.

Mr. Tongue: He was one of the directors of that company at that time and still is. [13]

The Court: Even so, the assumption by this witness that the mortgage was valid would have nothing to do with the conduct of either of them.

Mr. Tongue: Very well.

Q. Did you have any difficulty in collecting payment for that further work conducted for the company?

A. Yes.

(Testimony of Marion M. Valentine.)

Q. As I take it, there was a second lawsuit filed in that connection; is that right?

A. That is right.

Q. And there was a certain attachment issued to the American Lumber & Box Company as a result of that suit; is that right?

A. That is right; yes, sir.

Q. Now, Mr. Valentine, was there any further agreement or discussions between yourself and Mr. Camozzi as a result of that second lawsuit filed on your behalf?

A. Well, he come right up to the office.

Q. What was done and said at that time, if you know?

A. And he authorized Fleishman to give us half of what he had coming.

Q. What do you mean by that? Can you be a little more specific in what he did in that regard?

A. Yes. Well, when we continued hauling, you see, Fleishman received the lumber and he was to give us half of what Fleishman sent him—You know—give him. [14]

Q. You mean Fleishman was to pay to you half of what Fleishman owed to the Great West, is that right?

A. That is right.

Q. Was there any other discussion or understanding reached between you and Camozzi at that time?

A. The only thing, he asked us to quit hauling.

Q. Had you already stopped hauling?

A. That is right; we had already stopped.

(Testimony of Marion M. Valentine.)

Q. Was there any discussion of this attachment filed against the American Lumber & Box Company?

A. I don't remember.

Q. I didn't get that.

A. I don't remember what the discussion was.

Q. Was there ever any discussion of the attachment filed against the American Lumber & Box Company and any means that were to be taken or discussed to release the attachment?

A. Yes, he authorized—That is, he said he would haul enough lumber over there to take care of the attachment.

Q. In what amount? A. \$4,000.

The Court: I don't understand that.

Mr. Tongue: Your Honor, I think one of the agreed facts as it appears in Paragraph 24 of the pre-trial order, on Page 7, is that at the time of this second suit an attachment was issued on the American Box Company, and then in the latter part of [15] that paragraph it states that the sum of \$4,000 was paid to plaintiffs as a result of that attachment. That is the matter that is referred to by this testimony.

The Court: He talks about "him" or somebody. I can't understand who it is. First he says "he authorized" and then he said something else. I don't understand him.

Mr. Tongue: Q. When you say "him" are you referring to Mr. Camozzi? A. Yes, sir.

The Court: What did Camozzi do? Let's find out.

(Testimony of Marion M. Valentine.)

Mr. Tongue: Q. What did Camozzi do with reference to this attachment?

A. Camozzi said he would continue getting lumber over there until he raised the \$4,000.

The Court: Over where?

A. Over to the American Box in Lakeview, until he raised the \$4,000.

Mr. Tongue: Q. Was there any discussion between you and Mr. Camozzi as to how the payments were to be applied that were to be made by Fleishman to you on account of the Great West Lumber Company?

A. Well, we let the mortgage go ahead and take care of itself, and we applied the money to the open account.

Q. Was that discussed between you and Mr. Camozzi? A. I don't remember, sir. [16]

Q. Did you discuss with Mr. Camozzi whether or not the payments from Fleishman should be applied to the open account or to the mortgage, or how they should be applied?

A. Should be applied to the open account.

Q. What did he say, if anything?

A. It was all right.

Q. Pardon? A. It was all right.

Q. Was there any discussion at that time between you and Mr. Camozzi as to any claim made on your behalf for costs and attorney's fees in that case? A. It was \$750 attorney's fees.

Q. Did that include costs?

A. Yes, that is right.

(Testimony of Marion M. Valentine.)

Q. What did Mr. Camozzi say as to that?

A. It was okeh.

Q. Now, as I take it, Mr. Valentine, there were certain payments that came in later through the Fleishman Lumber Company after the suit was filed and after those discussions were had between you and Mr. Camozzi; is that right?

A. That is right.

Q. The amount of those payments is reflected in the pre-trial order under the admitted facts. Now, Mr. Valentine, when did you first learn that any tax liens had been filed against Great West Lumber Company? [17]

A. I found a letter that the Government issued.

Q. Did you receive a copy of such a letter?

A. I did not, no.

Q. Did you see such a letter? A. I did.

Q. About when did you see that letter, if you remember?

A. Oh, I believe it was in June, around the first of June.

Q. Of what year? A. 1948.

Q. 1948. Did you at any time learn that there was to be a proposed sale of the assets of the company for delinquent taxes? A. Yes.

Q. Do you remember when you first learned that?

A. In the letter—I think I made a mistake on that. I think that was January the 1st, wasn't it?

Q. Of what year? A. 1949.

Q. When you learned of the tax liens?

A. Yes.

(Testimony of Marion M. Valentine.)

Q. Did you then also learn that a sale was contemplated as a result of those liens?

A. Yes, the sale should be called on January the 27th, I believe.

Q. What did you then do, if anything?

A. I went down to the bank to make preparations to bid the mill in to protect our mortgage. [18]

Q. After you did that did you receive any communications from the company or anyone connected with the company?

A. Yes, I received a letter from Utah.

Q. There is now handed to you a document entitled Defendant's Pre-Trial Exhibit 29-A. I will ask you to look at that document and tell me if that is the letter you received at that time.

A. That is right.

Q. What did you then do after receiving that letter, if anything?

A. Well, we figured that the mortgage——

Mr. Leedy: Just a moment. If your Honor please, we will object to what the witness figured.

The Court: Yes.

Mr. Tongue: Q. What did you do, if anything, after receiving that letter? Did you continue with your negotiations with the bank or did you abandon them? A. Abandoned them.

Q. Did that letter have any bearing upon your abandoning those negotiations with the bank?

A. Yes, sir.

Q. Was that the reason why you abandoned those negotiations with the bank? A. Yes, sir.

(Testimony of Marion M. Valentine.)

The Court: This examination is extremely leading, Mr. Tongue.

Mr. Tongue: I will try to be more careful, your Honor.

Q. Do you know whether a tax sale was held at any later date? [19]

A. There was one held, I think, January the 27th.

Q. Were you present at that time?

A. Yes, sir.

Q. Was a sale consummated at that time, or do you know whether a sale was consummated at that time?

A. It was not. There was no sale.

Q. Do you know whether or not there was any later tax sale?

A. About thirty days. It must have been around February, or something like that; the last of February or the first of March, something like that, there was a sale.

Q. Were you present at that time?

A. Yes, sir.

Q. Do you have any recollection of what happened or what was done or said at that time?

A. Yes, sir.

Q. Would you please state what your recollection is as to what you observed or as to what happened and what was done and said at that time.

A. The mill was sold for \$7,500 prior to our first mortgage of \$10,000.

The Court: That is stricken.

(Testimony of Marion M. Valentine.)

Mr. Tongue: Just a moment, Mr. Valentine. I consent that that be stricken, your Honor.

Q. Do you remember whether or not there was any discussion of the mortgage at the time of that sale? [20]

A. There was no discussion, no.

Q. How is that?

A. No.

Q. Do you remember whether anyone on that occasion had anything to say on the subject of the mortgage?

Mr. Leedy: Now, if your Honor please, the witness has already stated that there was no discussion, or he does not recall it. This is an attempt to elicit it by leading the witness.

The Court: No, that is all right, if anybody said anything about the mortgage.

(Last question read.)

The Witness: He said the mortgage——

The Court: Now, just a moment. Who was it, and whom did he say it to?

Mr. Tongue: Q. Who was it?

A. The Government man.

Q. Do you know his name?

A. No. He said that our mortgage was prior at the sale.

Q. Are those the words he used, as you remember, or, if not, what did he say, if you remember?

A. I don't remember just——

(Testimony of Marion M. Valentine.)

Mr. Leedy: Then we will move that the answer be stricken as being a conclusion of the witness.

The Court: Stricken. [21]

Mr. Tongue: Q. Can you recall anything that the Government representative said at that time relating to the mortgage?

A. He said that our mortgage was prior to the sale. That is all I can remember.

Q. Up to that time had there been any question raised or any communication received by you from the company or anyone on its behalf concerning the mortgage?

A. Yes. There was another letter from——

Q. Did you receive another letter before the sale?

A. Yes.

Mr. Tongue: I will ask that Pre-Trial Exhibit 29-b be shown to the witness.

Q. There has been handed to you a document entitled Defendant's Pre-Trial Exhibit 29-b. It appears to be a letter bearing what date?

A. February 17, 1949.

Q. Does that refresh your recollection any on this matter? A. Yes.

Q. Was that the second letter you received from the company, or did you receive some other letter prior to that date and after the one previously shown to you?

A. That is the second letter that I received.

Q. The one that you now have in your hand?

A. Yes, that is right.

Q. Can you now testify as to whether or not you

(Testimony of Marion M. Valentine.)

received that [22] letter before or after the tax sale?

A. That was after the tax sale.

Q. At any time either before that date or after that date did the company or anyone on its behalf or connected with it raise any question as to the validity of the mortgage? A. No.

Q. They did not do it before the sale?

A. No.

Q. Did they after the sale?

A. Not to my recollection.

Q. You know, don't you, that the question has been raised in this case? A. Yes.

Q. When was the first time, to your knowledge, that that question was raised?

A. When we started foreclosure.

Q. In this case, do you mean?

A. On the mortgage.

Mr. Tongue: That is all.

Cross Examination

By Mr. Leedy:

Q. Mr. Valentine, do I understand correctly that you went to the bank to try to arrange financing to bid in this property before the first tax sale, before the first time the property was offered for sale? [23]

A. Yes, sir.

Q. And you abandoned those efforts before the first sale; is that correct?

A. After I got this first letter.

Q. Now, you are sure that you abandoned your efforts before the first sale because of this letter from Mr. Rudeen; is that correct? A. Yes, sir.

(Testimony of Marion M. Valentine.)

Q. Do you remember how long it was after the first offering that the property was actually sold?

A. It was over thirty days. I don't know just——

Q. Would it help your recollection any of the actual date of sale to look at the certificate of sale showing that the property was sold on January 27th, 1949? Does that date sound right to you as the time it was actually sold? A. No.

Q. About when do you think it was sold?

A. About a month later than that; sometime in February.

Q. What is the date of the second letter you had from Mr. Rudeen? A. February the 17th.

Q. You think that was before or after the actual sale? A. That was after the sale.

Q. Did you attend the first time the property was offered for sale? A. Yes, sir. [24]

A. At that time you were not prepared to bid; is that right? A. That is right.

Q. And the reason you were not prepared to bid is because you had this letter from Mr. Rudeen; is that correct? A. That is right.

Q. Do you remember at the first time the property was offered for sale that Mr. Ellison, the Government representative, stated that it was the position of the Government that their tax liens were ahead of your mortgage in so far as the personal property was concerned?

A. I don't remember that.

Q. Would you say that he did not make a statement to that effect? A. No, sir.

(Testimony of Marion M. Valentine.)

Q. In other words, you don't remember whether he did or did not? A. That is right.

Q. So you don't know now, then, whether or not the Government asserted the invalidity or partial invalidity of your mortgage at the time the property was first offered; is that right? Did you answer the question? A. No, sir. I don't remember.

Q. Now, then, do you remember the occasion——
Mr. Tongue: What was that answer?

The Court: He said he didn't remember.

Mr. Leedy: Q. Do you remember the occasion when the property [25] was actually sold? Were you present? A. Yes.

Q. Do you remember seeing Mr. Rudeen there?

A. Yes.

Q. And was Mr. Ellison, the same Government representative, conducting the proceedings as conducted the previous proceedings? A. Yes.

Q. Isn't it a fact, Mr. Valentine, that at that time Mr. Ellison again stated that the Government claimed their tax liens to be ahead of your mortgage as far as the personal property was concerned?

A. I don't remember that.

Q. You would not say now whether he did or did not make such a statement? A. No, sir.

Q. Isn't it a fact that at that occasion Mr. Rudeen asked Mr. Ellison before the sale actually was made whether the Government would guarantee the sale to be free of the mortgage as far as the personal property was concerned?

A. I don't remember that either.

(Testimony of Marion M. Valentine.)

Q. You would not say now whether Mr. Rudeen did or did not make such a statement or ask such a question? A. Not at the moment, no.

Q. Do you remember Mr. Ellison making the statement that the personal property had liens attached in Deschutes County before [26] it was brought down to the mill, and for that reason the tax liens were prior?

A. No, I don't remember that.

Q. Did you attend the meeting indicated in the letter, Defendant's Pre-Trial Exhibit 29-a? If you will refer to the last page, I think you will find that there was a meeting to be held in Bend around the 15th of January, 1949.

A. I know, but I did not attend it.

Q. Did you have a representative there?

A. No.

Q. You don't know what took place at that meeting? A. No; that is right.

Q. If you felt your mortgage was prior to the tax liens, why did you feel it necessary to negotiate with the bank for a loan to protect your mortgage?

A. Well, I didn't know at that time, when I made the statement, whether the tax lien was to go in effect. I didn't know what to do when I did that.

Q. Did you consult Counsel before making negotiations with the bank for financing?

A. Mr. Balentine.

Q. On his advice you entered into negotiations with the bank for the purpose of raising these funds?

A. Bidding in the mill, yes.

(Testimony of Marion M. Valentine.)

Q. Do you still say that you had no intimation that anyone [27] claimed your mortgage was invalid until this foreclosure case was started?

A. Will you repeat that again?

(Last question read.)

A. No.

Q. Do you remember receiving the letter, Defendant's Exhibit 29-b, dated February 17th?

A. That is right.

Q. Do you remember reading in there that Mr. Rudeen said he hoped to obtain a compromise of the mortgage?

A. Yes, sir.

Mr. Leedy: That is all.

Mr. Tongue: No further questions.

(Witness excused.)

(Short recess) [28]

U. S. BALENTINE

was thereupon produced as a witness in behalf of the plaintiffs and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tongue:

Q. What is your occupation, Mr. Balentine?

A. Attorney-at-law.

Q. Are you attorney for the plaintiffs in this case?

A. I am.

Q. How long have you acted as their attorney?

A. I have represented them since in July of 1948.

(Testimony of U. S. Valentine.)

Q. I take it you were their attorney in the filing of these suits that have been mentioned as having been filed late in July of 1948?

A. Yes, that is correct. I was their attorney.

Q. Did Mr. Camozzi come to your office after the filing of this suit?

A. He came within the next day or two after they were served, which was, I think, the day they were filed. They were served in Bend, because Mr. Valentine and I drove to Bend to get Judge Vandenberg's signature on the papers. He was holding court in Bend at the time. My recollection is that we got the sheriff Saturday morning, just before he left at noon, and left the papers with him. Whether they were served that day or the following Monday I am not sure, but immediately after service [29] Mr. Camozzi came to my office.

Q. Were there any discussions in your office between yourself and Mr. Camozzi and Mr. Valentine?

A. Yes, there were a great many.

Q. Will you state what, if anything, was said by Mr. Camozzi at that time?

A. Mr. Camozzi came into my office and introduced himself as president and general manager and in complete control and charge of the Great West.

Mr. Leedy: Now, if the Court please, we object to that last statement and move it be stricken as a conclusion of the witness. At this time we would like to have the record show that the Defendant Rudeen contends that Camozzi, the president and general manager, was without authority to execute this mort-

(Testimony of U. S. Balentine.)

gage or to negotiate for it or to make statements in connection with it that were in any way binding upon the Great West Lumber Corporation.

Mr. Tongue: Your Honor, I think it has already been ruled on a similar objection that it may be testified by the plaintiffs' witnesses what Camozzi said as to his authority on the issue of estoppel or apparent authority, which is one of the issues of this case.

The Court: I will receive it for what it is worth.

Mr. Tongue: Go ahead, Mr. Balentine.

A. Mr. Camozzi came into my office—That is the first time [30] that I ever met him—and introduced himself as president and secretary and in full charge of—

Q. Secretary, did you say?

A. President and general manager. I would like to correct that—and said that the papers had been served on the company's attorney-in-fact in Bend, and that he wanted to settle the matters up for the reason that anything stopping the sale of their lumber would close the operations down. And I got in touch with Mr. Valentine—He did most of it; my contacts were principally with him—and he came up, and we discussed the matter of what could be done in reference to settling these two lawsuits, the equity and the companion law case.

Q. As the result of those discussions were you instructed to prepare a certain mortgage?

A. Yes. It was agreed between the parties there in my office the \$6,000 cash be paid and a \$10,000 security be given in order to get these cases dismissed.

(Testimony of U. S. Balentine.)

And the \$6,000, Mr. Camozzi said, could be had from the Fleishman Lumber Company, their head office in Portland, to whom he was shipping the entire output of the mill. And at that time also he showed me a contract with the Fleishman Lumber Company that he had entered into as general manager of Great West to furnish the entire output of the mill during this season to Fleishman Lumber Company. We had several telephone conversations with Mr. Fleishman in Portland. Over a period of a few days there he came back daily to the office——[31]

Q. Who do you mean by "he"?

A. Mr. Camozzi. Excuse me. He came back daily to the office. We had several telephone conversations with Mr. Jim Fleishman, in charge of the Fleishman Lumber Company in Portland. Then in those conversations it developed that the Fleishman Lumber Company, through Mr. Jim Fleishman, did not admit that there was \$6,000 then due the Great West, but did indicate that he would personally secure in a satisfactory manner the amount of \$6,000. So I agreed to meet Mr. Camozzi in Portland, and Judge Vandenberg was then in Portland holding court, and I prepared a mortgage, the one that is in evidence here.

Q. Did you receive any instructions as to the preparation of that mortgage?

A. Yes. I received instructions from Mr. Camozzi as to the preparation of that mortgage.

Q. What did he tell you?

A. He told me in reference to the description of

(Testimony of U. S. Balentine.)

the mortgage that he had no way of giving me itemized descriptions of the various items of property.

Mr. Leedy: If the Court please, we object to this whole line of testimony. We object further to this particular line of testimony in so far as it goes to vary or contradict the terms of a written instrument which is here in evidence.

Mr. Tongue: I am not trying to vary or contradict it. I am simply showing the meaning of the general terms——[32]

Mr. Leedy: Or to explain it.

Mr. Tongue: I submit, you Honor, that one of the qualifications of the parole evidence rule is that where general terms are used in an instrument parole evidence is admissible to show the circumstances under which the instrument was executed as going to show the intention of the parties in the use of those general terms.

The Court: I think that is the rule. However, I will take this evidence over the objection.

Mr. Tongue: Very well. Would you read the question, please.

The Court: He said he had no way of giving him the items of personal property.

The Witness: Yes, except as to the large items that were there at the mill. And he gave me the description of some of the larger items of personal property there in the mill, that went to make up the mill, and those are the items that are specified in the mortgage. Then he gave me the further specification of the complete sawmill equipment as it then existed.

(Testimony of U. S. Balentine.)

Mr. Tongue: Q. That is, there were numerous other gas engines and other equipment there?

A. Yes. Those are his exact descriptions, which he told me was as nearly as he could make it.

Q. Now, as I understand it, Mr. Balentine, that mortgage was then executed by him purportedly on behalf of the corporation? [33]

A. In Portland. We went to Mr. Fleishman's office—I believe it is in the Lumberman's Building in Portland.

Q. What was then done with reference to the cases that were pending?

A. I had secured——

Mr. Tongue: I will withdraw that. It is stipulated they were dismissed.

Q. What was then done with the mortgage?

A. The mortgage was then placed of record in Klamath County after its execution.

Q. Did you make any search of the records at that time or thereabouts?

A. I personally had searched the records here in Klamath County prior to drawing the mortgage and going to Portland, and either before it was executed or soon thereafter I got a search from the Wilson Abstract Company. I am not sure whether that was before the mortgage was executed or afterwards, but I had personally searched the records and I found, after being told of this before by Mr. Camozzi, I found that there was a mortgage from the old B & C Company of record here on the personal property.

Q. I think that is stipulated. Did you find any other——

(Testimony of U. S. Balentine.)

A. Outside of that one, it was clear.

Q. Now, there has been testimony, and it is stipulated in this case, that after that mortgage was executed and filed there was [34] further work performed by Lilly & Valentine, and later a further lawsuit filed in their behalf, and that later certain payments were made by Fleishman to Lilly & Valentine on behalf of Great West Lumber Company. Did you at any time give any instructions to Fleishman with respect to those payments?

A. To Fleishman?

Q. To Fleishman, yes. A. Yes, I did.

Q. What did you do? What instructions did you give?

A. I wrote a letter to Mr. Fleishman terminating those payments.

Q. What was the reason for writing that letter?

A. My reason for writing that letter was this: That the second suit was brought for hauling after the mortgage from the 4th of August until the time of the suit, and when that case was filed, before it was served on the Great West attorney-in-fact in Bend, but after an attachment was served in Lakeview, Mr. Camozzi came into the office and negotiated concerning that lawsuit, and it was agreed that he was to continue to ship sufficient green lumber that he was then cutting to the garnishees in Lakeview until the amount of \$4,000 was accumulated over there. He had previously given instructions to Fleishman to give up one-third of the amount due

(Testimony of U. S. Balentine.)

the Great West on the deal with Fleishman. At this time, after the second lawsuit was filed—the third, actually; the two first ones and the next lawsuit—he agreed to increase that to half of the amount until that second lawsuit [35] was taken care of. And when that had been paid off I wrote Fleishman a letter that he might discontinue the payment of one-half of the Great West money to us.

Q. Are you referring to the letter written by you to Fleishman Lumber Company designated as Plaintiffs' Exhibit 14, dated November 1st, 1948?

A. That would be the letter.

Q. Now, Mr. Balentine, did you at any time learn that the Government was proposing to sell the saw-mill because of tax liens?

A. Yes, I learned——

Q. When did you first learn of that?

A. I personally learned about that soon after November 2nd.

Q. Did Lilly & Valentine ever come in to you and ask for advice in that respect?

A. Yes, they did.

Q. When did they first come to you, if you remember?

A. They came to me sometime in December, I will say, or at least by that time.

Q. Did you advise them what they should do or whether they should do anything with respect to that proposed sale?

A. I advised them——

Mr. Leedy: We object to that, of course, to what he advised them. Whether or not he advised them we

(Testimony of U. S. Balentine.)

have no objection to. It would not be binding on this defendant or anyone else as to what advice he gave them. [36]

Mr. Tongue: Your Honor, this in a sense is preliminary. What I want to develop through this witness is not only the circumstances of the sale at which he was present, but also I want to develop through this witness the fact that the plaintiffs brought to him this letter written by Mr. Rudeen and asked his advice, and what that advice was. It goes to the issue of our claim that the Defendant Rudeen is estopped to challenge the validity of the mortgage and to claim that the mortgage was inferior to his title under the tax sale because of his conduct, including among other things the writing of these letters to the plaintiffs.

The Court: Objection overruled.

Mr. Tongue: Would you read the question?

(Last question read.)

A. When they first came to me in reference to the Government's claim of taxes, I came over and looked at the Klamath County records here, and there had been a series of filing of notices, beginning with November 2nd, is my recollection, here in Klamath County; and in the aggregate I learned along during this course of discussing it with my clients that the Government was claiming some \$35,000 as tax liens. I discussed that situation with them, but at that time I was not myself sufficiently conversant with the law of the priority of Government liens

(Testimony of U. S. Balentine.)

to be entirely satisfied to advise them on the situation. So I investigated from the legal standpoint, and I advised them that since there was [37] that much money involved in the Government lien I did not believe it would be good business for them to invest that much more money in that property up there.

Q. Are you referring to the first or the second sale? A. The first sale.

Q. Do you recall how much the property was offered for at that first sale?

A. I didn't attend the first sale, because the Government's lien, as I say, was some thirty-five thousand or thirty-six thousand dollars, as I remember it. I did not attend the first sale. After it he came back and consulted me again and reported to me that—

The Court: Now, just a moment.

Mr. Tongue: Just a moment, Mr. Balentine.

Q. Did you later learn that there was to be a subsequent sale?

A. Yes, I did, and I later learned—

Q. Just a moment. Did your clients come to consult you and ask your advice as to what they should do with reference to the second sale?

A. They did that, yes.

Q. Did they or did they not show you a letter written by Defendant Rudeen under date of January 6 in that connection?

A. Mr. Valentine brought that letter to my home on receipt of it, to me.

Q. Did you advise them under those circumstances?[38] A. Yes, I did.

(Testimony of U. S. Balentine.)

Q. And after seeing that letter?

A. Yes, I advised them in the light of that letter.

Q. What was your advice to them at that time?

A. I advised them that, having recognized that mortgage, I didn't think——

Q. What do you mean?

A. The mortgage in question here.

Q. How do you mean the mortgage was recognized?

A. It is in the letter referred to, the exhibit referred to, as the letter sent to Lilly & Valentine of January the 7th, is my recollection of it.

Q. I show you this letter dated January 6th, 1949,——

A. The 6th.

Q. ——designated as Defendant's Pre-Trial 29-a, and ask you if that is the letter to which you have reference?

A. Yes, that is the letter.

Q. I now ask you what advice, if any, you gave to the plaintiffs at that time?

A. I advised them that the company, through this letter, was recognizing their mortgage as a binding mortgage. In the meantime I had checked the law in reference to the priorities of these tax liens, and it was my advice to them at that time that they would not be required to raise any money to bid at these tax sales. I had previously been to the bank with them on the question [39] of arranging for money.

Q. Did you later attend the second sale?

A. I attended the second sale.

(Testimony of U. S. Balentine.)

Q. Do you have any recollection of what was said and done there? A. Yes, I do.

Q. Would you state what your recollection is as to what was done and said at that time?

A. That sale was conducted, according to my recollection, on the 27th day of January, 1949, at the millsite of the Great West Lumber Corporation. I went up there in company with Mr. Lilly and Mr. Valentine both. We got there some little time before the sale started, the actual auction and bidding started. We saw Mr. Ellison and had a talk with him.

Q. Who was he?

A. He was the Government representative in charge of conducting the sale. Then the sale started, and Mr. Ellison announced as a preliminary to accepting bids to all the parties present there that the sale was conducted subject to a \$10,000 mortgage to Lilly & Valentine, and that the Government was selling it subject to that mortgage, with one contingency on the part of the Government: That, according to the information the Government had, some of the articles of personal property had been purchased in Bend after the Government had filed their lien in Deschutes County, and that as to those items it was the contention that the Government's lien attached to those items and would follow [40] them in Klamath County, and that was the only exception to selling—to the fact that it was being sold subject to this particular mortgage.

Q. Did you see Mr. Rudeen at that sale?

A. I saw him, yes, and talked to him.

(Testimony of U. S. Balentine.)

Q. Did he make any statement in the presence of Ellison and the other people at that time that you recall?

A. Mr. Rudeen made some statements during the course of the sale that I heard. One of Mr. Rudeen's statements was he inquired of Mr. Ellison if the Government would guarantee title to the personal property to any person who bought it.

Q. Do you remember any other statement that Mr. Rudeen made at that time?

A. That is the only statement that I remember him making at that time.

Q. Did Mr. Ellison make any reply to that statement that you remember?

A. Yes. Mr. Ellison told him that it was the Government's contention that any articles of personal property bought out of Deschutes County after their lien was filed there, that the lien on those items would still attach in Klamath County. Then Mr. Ellison addressed me in the audience there, as the attorney for Lilly & Valentine, and asked me what our position was.

Q. Did you reply to that request for a statement?

A. I did. I told him that it was our position that the \$10,000 [41] mortgage was prior to the Government's lien.

Q. What else was done or said at that time, if you remember, if anything?

A. After that the sale was adjourned and then reconvened in just a few minutes, and again offered for a lower figure than it had been offered before.

(Testimony of U. S. Balentine.)

Q. Were any bids submitted there?

A. Yes. Mr. Rudeen submitted a bid of \$7,500, and the bid was accepted.

Q. Do you know whether prior to that sale the Great West Lumber Company, or anyone on its behalf or in connection with it, had made any contention that this mortgage was invalid for lack of authority to execute it?

A. No contention had ever been made to me.

Q. Or any that you know of?

A. None that I know of.

Mr. Tongue: That is all.

Cross Examination

By Mr. Leedy:

Q. Mr. Balentine, during the summer of 1948 did you perform professional services for the Great West Corporation as your client?

A. On one occasion while we were trying to get payment on the \$6,000 note which became in default, that Mr. Fleishman had given, had signed personally, in addition to this \$10,000, I wrote a [42] letter for Mr. Rudeen to Mr. Fleishman——

Q. You mean Mr. Camozzi?

A. Mr. Camozzi; excuse me—Mr. Camozzi to Mr. Fleishman concerning the contract which existed between the two.

Q. About when was that?

A. Oh, that—I will estimate it the best I can. That would be some time—the note was due in ten days, the \$6,000 promissory note was, and it was

(Testimony of U. S. Balentine.)

after that time and before this second suit was started.

Q. Some time during the latter part of August or September of 1948; is that right?

A. I presume that would be about right.

Q. Did you render any other professional services for Great West?

A. That is all that I have.

Q. Or Camozzi personally?

A. That is all.

Q. Now, I understand that when Mr. Valentine, one of your clients, showed you this letter which is in evidence here, the one of January 6th, 1949, Defendant's Exhibit 29-a, you advised them that that letter constituted a recognition by the company of the mortgage; is that right?

A. That is what I told him.

Q. As of that date, January 6th, 1949, the date the letter was written? [43]

A. Yes.

Q. And that was your basis of advising them that they need not protect themselves on bidding at the sale?

A. That was not entirely my basis. In the meantime I had checked to know the priorities, which I was not too familiar with at the time it first came up, as between the filing of the tax liens in Klamath County on November 2nd and the filing of our mortgage on the previous August the 4th, and that was a part of the reason that I had, together with this letter.

Q. Now, Mr. Balentine, in view of your opinion

(Testimony of U. S. Balentine.)

that their mortgage was prior to the tax liens, you would not in any event have advised them to bid at this tax sale regardless of this mortgage, would you?

A. Well, I had advised them before and gone to the bank with them to make preparations just out of an abundance of caution on the matter, if it didn't cost them too much, if they didn't have to invest too much money.

Q. You still, then, entertained some doubts as to the priority of the mortgage?

A. Not at the last time, I guess. I guess I didn't at the last time. I think I finally concluded that they were prior in time there.

Q. So if they followed your advice they would not have bid at the sale in any event?

A. I don't know that I would have advised them not to bid at [44] the sale, even though I knew it was prior.

Q. Now, the tax liens were filed in Klamath County in November, 1948; that is right, isn't it?

A. November 2nd, I believe, my recollection is.

Q. And this recognition by the corporation of the mortgage was on January 6th, 1949, some two months subsequent? A. Yes.

Q. If some third person had bought this property at the tax sale, do you think that the subsequent recognition by the corporation of that mortgage would have been binding as against that third person? A. Yes, I do.

Q. Do you think that a subsequent ratification

(Testimony of U. S. Balentine.)

of a mortgage would be binding upon someone who acquired through the earlier tax liens?

A. Does that question presuppose that the tax liens were superior? Does that question of yours do that?

Q. I am supposing the actual facts here.

A. All right.

Q. Here we have a mortgage given in August, and we have tax liens filed in November. Then you have a letter written, you say, which in your opinion constituted recognition by the corporation of the mortgage in January. A. Yes.

Q. Now, my question is, under those circumstances would it have [45] been your opinion that the recognition of the mortgage in January would go back ahead of the tax liens in November?

A. I don't think it would affect the priorities as between the two, no. I didn't think so then.

Q. It was your opinion that this mortgage was a valid and prior lien prior to November of 1948?

A. Do you mean it was a prior lien prior to that time, or it was my opinion prior to that time? Is that what you mean?

Q. Well, was it a prior lien prior to that time?

A. Yes, I think it was.

Q. Now, what possible bearing upon your opinion, then, could a letter have which indicated to you that the corporation was recognizing what you say was already a prior lien?

A. It only had this: At the time that it was discussed there at my house, when it was brought over

(Testimony of U. S. Balentine.)

there—my clients were very nervous about these Government liens in reference to their mortgage, and they were anxious, if possible, not to have to be put to the proposition of being confronted with a question of priority between the two.

Q. Has it been your opinion, Mr. Balentine, that the president of a corporation has apparent authority to execute a mortgage of the principal assets without direct authority from the directors?

A. That is not my opinion as a general proposition, but that is my opinion in reference to this particular mortgage. [46]

Q. You did not investigate on behalf of your clients what the express authority of Mr. Camozzi was about company mortgages? A. I did not.

Q. Isn't it a general proposition that more than one corporate officer participates in the execution of a mortgage of this consequence?

A. That is correct.

Q. Isn't it customary in your practice that the corporate seal is attached to an instrument purporting to be executed on behalf of the corporation?

A. That is correct.

Q. Yet neither of those things was done in this instance; isn't that right? A. That is right.

Q. Now, then, again, Mr. Balentine, what significance to you did this letter of January 6th have which led you to the conclusion that the corporation was recognizing the mortgage? Did that mean that there was some doubt in your mind about it prior to that time?

(Testimony of U. S. Balentine.)

A. Well, there probably was in a measure, yes.

Q. Isn't it a fact, Mr. Balentine, that your clients reported to you from the first tax sale that the Government was questioning the validity of the mortgage as far as the personal property was concerned?

A. No, they made no such report to me. [47]

Q. They did not? A. They did not.

Q. You understood they attended the first sale?

A. They did attend, yes.

Q. Now, when Mr. Rudeen bid at the tax sale, isn't it a fact that he bid in his own name?

A. That is correct.

Q. Mr. Ellison asked him if he was bidding in his own name and he said he was?

A. I don't remember that, but I remember afterwards Mr. Rudeen discussed it with me, after the sale.

Q. Did he tell you at that time he was bidding on his own account?

A. He said he had bought it personally, himself.

Q. At that time didn't he tell you that he did not recognize this mortgage? A. No, he did not.

Mr. Leedy: That is all.

Mr. Tongue: No further questions.

(Witness excused.) [48]

GRIFFIN HALE

was thereupon produced as a witness in behalf of the plaintiffs and, having been first duly sworn, was examined and testified as follows:

(Testimony of Griffin Hale.)

Direct Examination

By Mr. Tongue:

Q. What is your occupation, Mr. Hale?

A. Well, for about the last five years I have been cruising timber.

Q. Do you know Mr. R. O. Camozzi?

A. Yes, sir.

Q. When did you first meet him?

A. Some time in '47. I don't know; some time in the fall of '47.

Q. Did you ever do any work or perform any services for the Great West Lumber Company?

A. Yes, sir.

Q. At whose request? A. Mr. Camozzi's.

Q. What was the first work that you did for the company and on about what date?

A. I think about December in '47 I began to buy timber for them on commission. In other words, I made a deal for the timber and they bought it, and then I got a dollar and a half for all the timber that I located and bought for them. I made deals, and Mr. Camozzi paid me for the timber; he paid me a dollar and a half for what I got.

Q. Now, between December, 1947, and June of 1948 did you locate [49] any timber for the company as a result of that understanding with Mr. Camozzi?

A. Yes, sir; I did.

Q. Were you present with Mr. Camozzi when any of those deals were closed?

A. Yes, sir, one, at least.

(Testimony of Griffin Hale.)

Q. What was the largest deal that you remember of between those dates?

A. Well, I think it was the stuff that we bought from R. T. Renner, was the biggest deal I ever did close. I am pretty sure that was in April, right about the first of April in '48.

Q. Was that the Lakeview purchase?

A. Yes. We went to Lakeview and Mr. Camozzi gave Mr. Renner a check. He paid off a thousand dollars in a check, and then he would pay him for this timber and leave the thousand dollars up all the time to secure other timber that he would get from him.

Q. What was the total purchase price of that timber, if you remember?

A. Well, we bought what was in Sections 29 and 28, why, we give twelve for it, and what was in 26 and 27 we give ten dollars.

Q. Do you remember approximately what the total purchase price was for that timber?

A. Well, I think around \$10,000 is what he paid for it, what he got out of it. Of course, all I got is my commission. I drew \$1,074 from him on commission. [50]

Q. Mr. Hale, do you know whether or not Mr. Camozzi closed that deal himself?

A. He did. There was nobody else but him on all the other contracts.

Q. Did anybody else have authority to make that purchase that you know of? A. No.

Q. Did he sign the papers himself?

(Testimony of Griffin Hale.)

A. He wrote a check and give Mr. Renner—He wrote him a check for a thousand dollars. He only had one check with him, and there was something else that he had bought, another little patch of timber with forty-some-odd thousand feet. He says, “This is the only check I have with me. I will have to send you another check.”

Q. Mr. Hale, do you recall a forced sale at Pringle Falls?

A. Well, I know of it. I know when they had it, yes.

Q. When was that, do you know?

A. I don’t remember. I think it was June.

Q. Early or late in June?

A. I don’t really know just the date there. I am not sure it was in June, but that is just my idea about it.

Q. Mr. Hale, were you ever around the mill of the company? A. Yes, sir.

Q. Were you around there on frequent occasions or just infrequently? [51]

A. Oh, I was there two or three times a week, and maybe oftener.

Q. Did you ever see any other officer or director of the company at the mill? A. I never did.

Q. Other than Mr. Camozzi?

A. No, sir; I never did.

Q. Did you ever observe to whom questions were referred for directions or decision?

A. No, sir; I never knew nobody but R. O.

(Testimony of Griffin Hale.)

Camozzi had anything to do with it, as far as I was concerned.

Q. Did you ever hear other people referred to for decisions or directions?

A. No, sir; I did not.

Q. Were you present at the tax sale at which the sawmill was sold to Mr. Rudeen?

A. Yes, sir; I was there at both. I was there from the beginning until the ending of it. I was guard there. I took care of the Government's interests there while they had this seizure.

Q. Do you remember what was done and said at the time of the second sale? Do you remember what was done and said at the meeting in January at which the mill was sold to Mr. Rudeen?

A. I do, I think. I just can't remember just word for word.

Q. Well, just state what you remember as having been said and done and by whom at that time, as you remember it. [52]

A. Well, they called the sale——

Q. Who do you mean by "they"?

A. Mr. Ellison, Mr. Robert Ellison, the Government man, Federal man, from Portland. He called the sale and he read—He had a mortgage, and he read the mortgage there to the public, to the best of my remembrance—I don't know just what it was, but he called for a certain plot of land in Section 13, with a sawmill with two headrigs, edger, and a trimmer, and a number of gasoline engines. I be-

(Testimony of Griffin Hale.)

lieve that is just about the way he read the mortgage.

Q. Did he say anything else that you remember?

A. Well, I really—I just can't recollect right now that I know of. But he might have, but of course——

Q. Do you remember whether Mr. Rudeen said anything at that time?

A. Well, Mr. Rudeen was there at both sales. He was at both of the sales. He bought the lumber the first sale—I think the 27th, the 26th or 27th of December; and on the 27th day of January he bought the mill.

Q. At the second sale at which he purchased the mill do you remember whether or not he made any inquiry as to whether or not the Government would guarantee title to the personal property?

A. He may have, but I just don't really remember that. It seems like there was something said, but I just can't word it, and I wouldn't be safe in stating it if I couldn't state it for sure. [53] At least, there was something said about it, but I really don't know what it was now.

Q. Do you remember whether Mr. Ellison said anything as to what the rights of the purchaser at the sale would be with respect to the mortgage?

A. Well, I believe Mr. Ellison said there was a \$10,000 mortgage, and a new motor that belonged to Moty & VanDyke, and a Ford truck.—It seems like to me that was it—it was not included in the sale; there was some payments to be made on the

(Testimony of Griffin Hale.)

Ford truck, and the motor from Moty & VanDyke, a new motor, that wasn't paid for which was brought out of Deschutes County.

Q. Did he say anything as to whether the purchaser would have to pay the mortgage?

A. Yes, I am sure he included the \$10,000 mortgage above the sale; told them that would have to be prior to the sale.

Mr. Tongue: That is all.

Cross Examination

By Mr. Leedy:

Q. Mr. Hale, don't you remember at both sales Mr. Ellison said that the Government felt their liens were ahead as far as the personal property was concerned, and that as far as they were concerned the Government felt they could give a title ahead of the mortgage?

A. No, sir; I don't.

Q. You don't remember that? [54]

A. He did not. I think the first time no word was mentioned at all about the mortgage, but the last sale he did; he told them all that they would have to pay the mortgage above the Government sale.

Q. You don't remember Mr. Rudeen asking Mr. Ellison if they would guarantee that he would not have to pay the mortgage on the personal property?

A. Mr. Rudeen might have talked to Mr. Ellison out of my hearing about that, I don't know. Not right in my presence, he didn't.

Q. I see. You don't know what conversations went on there when you were not present?

A. They went on and talked, of course, but I

(Testimony of Griffin Hale.)

don't know what they talked about. I heard them bring out the \$10,000, and he read it out in the paper so everybody could hear it.

Q. You knew this Great West Lumber Company was a corporation, didn't you?

A. I know they had it on their mail, but I never seen—I never knew there was anybody in that—I thought Mr. Camozzi and his brother was the only men that was the corporation. I saw his brother one time, and I didn't know there was anybody else.

Q. Well, you didn't know who was in the corporation, did you? A. No, I didn't.

Q. You didn't know these people; there could have been a dozen officers and directors around there and you might not have known it; isn't that [55] true?

A. I saw them later on, after I got there—I saw several of them later when I got to watching that property. I saw Mr. Ramseyer and his son-in-law. They came down, but I didn't know when I was working out there with Mr. Camozzi that they had anything to do with it.

Mr. Leedy: That is all.

Redirect Examination

By Mr. Tongue:

Q. Did you see them there prior to the sale?

A. No, never in my life. I never saw them until the sale, until the Government seized the stuff and put me down there with it.

Mr. Tongue: That is all.

(Witness excused.) [56]

REUBEN E. LONG

was thereupon produced as a witness in behalf of the plaintiffs and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tongue:

Q. Mr. Long, what is your occupation?

A. Rancher.

Q. Do you know R. O. Camozzi?

A. I do.

Q. Did you ever do any work for the Great West Lumber Company? A. Yes, sir.

Q. In what connection and in what capacity?

A. Well, as a timber purchaser.

Q. Did the company enter into a contract with you to purchase timber on its behalf?

A. Yes, sir.

Q. Is that the contract executed on May 1st, 1948, referred to in this record as Plaintiffs' Pre-Trial Exhibit 22?

A. I presume it is. I haven't seen it.

Mr. Tongue: May it be so stipulated, Counsel?

Mr. Leedy: Yes, I am sure that is right.

Mr. Tongue: Q. Were you present at the sale at which Mr. Rudeen purchased the sawmill of the Great West Lumber Company? A. Yes, sir.

Q. Do you remember anything as to what was said and done at that time? [57] A. Yes, sir.

Q. Would you state to the best of your recollection what was said and done at that time.

(Testimony of Reuben E. Long.)

A. Some of the details, perhaps, are not clear in my mind.

Q. Speak a little louder, will you, please.

A. Perhaps some details of the conversation are not clear in my mind, but I remember clearly that Mr. Ellison, who represented the Government said that he was selling the property subject to a certain mortgage.

Q. Was anything else said or done that you remember?

A. Well, there was considerable other discussion, but I don't feel that it is clear enough in my mind that I could testify to it.

Mr. Tongue: That is all.

Cross Examination

By Mr. Leedy:

Q. Were you present at both sales, Mr. Long?

A. I was.

Q. Don't you remember at the first sale that Mr. Ellison said the Government felt that their liens were ahead of the mortgage as to the personal property, and that the personal property was very generally described in the mortgage and was too generally described for the mortgage to be good?

A. I remember a discussion about that detail, but I don't believe [58] that I could give it as it was agreed upon.

Q. You remember there was a discussion as to whether or not the mortgage was wholly good?

A. I wouldn't say that. I remember that there was

(Testimony of Reuben E. Long.)

a discussion about a mortgage, and what it covered and what it did not cover and as to priority, and so on, but I don't think that I have clear in my mind what the outcome of that conversation was.

Q. You don't remember now whether Mr. Rudeen asked Mr. Ellison whether the Government would guarantee those property rights as far as this mortgage was concerned?

A. No, I don't.

Q. You are not able to say now whether he did or did not make such an inquiry?

A. That is right.

Q. Or what any answer might have been; is that right? A. That is right.

Mr. Leedy: That is all.

(Witness excused.)

Mr. Tongue: May it please the Court, Counsel has stipulated that we may submit the deposition of Harry Barry, the secretary of Great West Lumber Company, which was taken in Idaho last week. That has been marked as a pre-trial exhibit and has been included with the other exhibits and made part of the record.

The Court: What is the number of it? [59]

Mr. Tongue: The number of that exhibit is Plaintiffs' Exhibit 19.

The Court: It is already in evidence?

Mr. Tongue: Yes, it is.

The Court: It may be treated as though it were read.

Mr. Leedy: That is satisfactory.

Mr. Tongue: Counsel has also stipulated that, rather than call the Defendant Rudeen as an adverse witness, we may offer in evidence the deposition taken of him yesterday, despite the fact that he is present at this time, for the purpose of expediting the time required for this trial. That is designated as Plaintiffs' Exhibit 20. I might say that that is being transcribed, but we expect that it will be here today and an exhibit number has been reserved for it.

The Court: It may be treated as though read.

Mr. Tongue: That completes our case, except we want to call at some time Mr. Farrens on the question of attorney's fees if plaintiff prevails.

(Short recess.)

Mr. Tongue: If the Court please, Mr. Farrens is here. With the permission of the Court and Counsel, I would like to call him so that we may complete our case.

PAUL P. FARRENS

was thereupon produced as a witness in behalf of the plaintiffs and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tongue:

Q. Mr. Farrens, you are an attorney-at-law?

A. Yes.

Q. How long have you practiced?

Mr. Leedy: We concede Mr. Farrens' qualifications.

(Testimony of Paul P. Farrens.)

Mr. Tongue: Very well. Counsel, I will ask for a stipulation, for the purpose of framing a hypothetical question to Mr. Farrens, that Mr. Balentine and I, if called, would testify that Mr. Balentine has spent at least sixteen days on this case, including the preparation of the pleadings, conferences with his clients, and investigation of the law and the facts, trips to Portland, and other matters up to the present time; and that I have spent at least eight days in the preparation of the case for trial, in negotiations of the pre-trial order, trips to Idaho, and conferences with witnesses. Would you stipulate that we would so testify, if called?

Mr. Leedy: Based upon your representation to me to that effect, we will so stipulate.

Mr. Tongue: Q. Mr. Farrens, assuming the facts to be true, subject to the stipulation just made—Let me ask you first: Have you examined the pre-trial order and the pleadings in this [61] case?

A. I glanced through the pleadings. I read carefully that portion of the pre-trial order which set forth the contentions of the parties and the issues to be tried, and then I read hastily the voluminous admitted facts.

Q. Based upon your examination of the pre-trial order and such examination as you have made of the pleadings, and assuming for the purpose of this question the facts just stipulated, and bearing in mind the amount of the mortgage involved, the value of the property involved, the difficulty and importance of

(Testimony of Paul P. Farrens.)

the legal questions involved, the amount of time devoted by Counsel to the case, do you have an opinion as to what would be a reasonable attorney's fee for attorneys for the plaintiff in this case in the event that they should prevail?

A. I would have, but your question included the matter of the value of the property sought to be foreclosed against, and I have no knowledge concerning that.

Q. Eliminating that item from the case so far as this question is concerned, then, Mr. Farrens, do you have an opinion as to what would be a reasonable fee?

A. May I ask you one question? Yes, I would have an opinion, but I would need to know one more thing: What, if any, service will be performed by you or Mr. Valentine, if you know, prior to the submission of this case to the Court for final decision?

Mr. Tongue: We anticipate it will be necessary—May I state [62] this for the record?

Mr. Leedy: Oh, yes, of course.

Mr. Tongue: It will, we anticipate, be necessary to prepare a brief for the submission of this case, since we anticipate that it will be so submitted to the Court. We anticipate that it will require probably at least three or four days for the preparation of the opening and reply brief for that purpose.

A. With that additional information, it would be my opinion that \$3500 would be a reasonable attorney's fee, and that anything less than \$2500 would be less than compensatory for the services rendered.

Mr. Tongue: No further questions.

(Testimony of Paul P. Farrens.)

Mr. Leedy: No questions.

(Witness excused.)

Mr. Tongue: That completes our case, your Honor.

Mr. Leedy: If your Honor please, with reference to this matter of attorney's fees, we would like to leave the matter without further testimony, with this understanding: That by not producing testimony we do not necessarily concede the opinion of the witness to be correct. We are willing to leave the matter to the discretion of the Court, and I understand that arrangement to be satisfactory with Counsel, if it is with the Court.

The Court: Yes. [63]

Mr. Tongue: That is satisfactory.

DEFENDANT'S TESTIMONY

CARL RUDEEN

one of the Defendants herein, was thereupon produced as a witness in his own behalf and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Leedy:

Q. You are the Carl Rudeen who is a defendant and cross-claimant in this litigation?

A. Yes, sir.

Q. You are a director of the Great West Lumber Corporation, and it is admitted you have been since June 25th, 1948; is that correct?

(Testimony of Carl Rudeen.)

A. Yes, sir.

Q. You are a substantial stockholder in the company?

A. Yes, sir.

Q. Are you also a creditor?

A. Yes, sir.

Q. Now, when you became a director, Mr. Rudeen, what was your then belief as to the general financial condition of the Great West Lumber Corporation?

A. I considered it good.

Q. Was a dividend voted at the meeting in June,—June 25th, 1948?

A. Yes, sir. [64]

Q. When did some question occur in your mind as to the financial condition of the company?

A. Well, I became a little bit suspicious in about the first of September.

Q. Do you recall a meeting of the Board of Directors on November 15th, 1948, as shown by the minute book?

A. Yes.

Q. Do you recall the occasion at that meeting—That is admitted here—of the appointment of an executive committee?

A. Yes, sir.

Q. You were one of the members of that committee, were you?

A. Yes, sir.

Q. When did that executive committee first meet?

A. On November the 17th.

Q. Of 1948?

A. 1948.

Q. Last year. At that time was Mr. Camozzi present?

A. Yes, sir.

Q. Prior to the meeting of the Board of Directors on November 15th, had the general management of the company been entrusted to Camozzi?

(Testimony of Carl Rudeen.)

A. Yes, sir.

Q. And the minutes which are admitted here show that on November 15th the directors divested him of those powers of management; is that [65] right?

A. Yes, sir.

Q. At the time of the meeting on November 17th of your executive committee did this statement which is in evidence here as Defendant's Exhibit 30-b come up for consideration by your executive committee?

A. Yes, sir.

Q. Now, what did your executive committee do during the period immediately following their meeting on November 17th?

A. Well, after we had found—November the 17th was really the first that we had learned of the bad condition in which this company was in, and immediately after finding that out, why, we took steps to—in one way or another to try to save the company or to reorganize, to continue to operate the mill in the future.

Q. Was consideration given to an RFC loan?

A. Yes, sir.

Q. Was an application made?

A. Yes, sir.

Q. What was the ultimate disposition of it?

A. Well, that was finally turned down.

Q. About when, if you remember?

A. Well, that was turned down—That was turned down in—Well, it was just ahead of the first sale or ahead of the second sale. I can't quite remember. That was turned down, I believe—No, in December;

(Testimony of Carl Rudeen.)

about December the 20th.

Q. Of 1948? [66] A. Yes.

Q. Was any effort made to postpone the tax sale, to get this tax sale postponed?

A. The first one?

Q. Yes. A. Yes.

Q. Were you able to have it postponed without being called for sale?

A. Well, we just didn't have any money available to bid the first sale in, but we were unsuccessful in having the sale postponed, because they went through the procedure.

Q. What is the financial position of the Great West Lumber Corporation today?

A. Oh, it is very bad.

Q. Does it have any assets? A. No, sir.

Q. Roughly, how much money does it owe?

A. Well, in the neighborhood of about——

Mr. Tongue: Just a moment. May I ask the purpose for which this testimony is offered?

Mr. Leedy: This testimony is directed toward the dispute set forth in the pre-trial order relating to the activities, actions, motives, and so forth, of Mr. Rudeen during the period subsequent to November 15, 1948.

Mr. Tongue: Very well. [67]

Mr. Leedy: Q. Was it in excess of \$100,000?

A. Yes.

Q. At this time, in your opinion, is the company hopelessly insolvent? A. Oh, yes.

Q. When did you arrive at the opinion that it was

(Testimony of Carl Rudeen.)

hopelessly insolvent?

A. Well, we arrived at that at about December the 20th.

Q. After December 20th, 1948, did you participate in any actions designed to work out the salvation of the corporation within its own structure?

A. No, that procedure was previous to December the 20th. We had give up the idea of saving the old company by December the 20th.

Q. Were you present at a meeting of stockholders on December 20th, 1948? A. Yes.

Q. Are you familiar with the recital in there with reference to the formation of a group for the raising of money to bid at the sale? A. Yes, sir.

Q. At that time were you and Mr. Ramseyer appointed by the stockholders at that meeting as a committee to see what could be done with this program?

A. Yes, sir. [68]

Q. Were you present at a meeting of the Board of Directors of that corporation on December 26th, 1948? A. No, sir.

Q. Are you aware of the record of that meeting indicating some effort on the part of the directors to borrow money on behalf of the corporation to pay off the taxes? A. Will you repeat that?

(Last question read.)

A. Yes.

Q. Did you participate in that activity after December 20th?

A. No,—December 26th, you mean?

(Testimony of Carl Rudeen.)

Q. After December 20th did you participate in it?
A. Oh, yes.

Q. In the activity of the Board of Directors. I am not making myself clear, Mr. Rudeen.

A. You was asking me at a meeting of December the 26th, which I wasn't there.

Q. Yes. Did you participate in any action by the Board of Directors growing out of this meeting of December 26th?
A. Oh, yes.

Q. What did you do?

A. Well, we went ahead and we proceeded to make out a letter to try to raise money in order to keep—to bid the sale, which we had decided by that time to bid the property back in at the sale. [69]

Q. Was this in accordance with the program of the stockholders' meeting of December 20th or the directors' meeting of December 26th?

A. Yes.

Q. Which?

A. Oh, which one? Of December the 20th.

Q. Then who wrote this letter which was sent out over your signature on January 6th, 1949?

A. That was Attorney Stephan at Twin Falls.

Q. Had he been the company attorney up there?

A. Yes.

Q. Will you state whether he was the one who had prepared corporate minutes generally during the life of the corporation?
A. Yes, he was.

Q. I call your attention, Mr. Rudeen, to some language in this letter of January 6th, which is Defendant's Exhibit 29-a, as follows: "In order to save

(Testimony of Carl Rudeen.)

a part of the assets of the corporation, a few of us have already contributed to a fund which now amounts to a considerable amount." Also this language: "There is no money in the treasury of the corporation from which payment of any of the above-described debts can be paid, and accordingly it will be necessary for the stockholders and creditors to come to the rescue of the corporation or all of the investments of the stockholders will have been wiped out." Do you recall that language? [70] A. Yes, sir.

Q. Now, what was your intention in sending out this letter over your signature?

A. This letter was written primarily to raise money in order to bid, which we had decided by that time—to bid the property back in at the sale.

Q. Well, when you say "bid it back in" who was going to bid it in?

A. Well, to bid in the—bid at the sale.

Q. For whose benefit? For whose account?

A. That was for the account of the creditors and stockholders of the company.

Q. For any particular ones of those?

A. No.

Q. How about those who put up money? Were they to participate in it?

A. That had lost money, you mean?

Q. No, those who put up money in your group?

A. Oh, yes.

Q. What about those who did not put up money?

A. Well, they wasn't to participate, no.

Q. In other words, this was a program for the

(Testimony of Carl Rudeen.)

benefit of those who put up money for this purpose; is that right?

A. That is right; yes, sir.

Q. When did you first learn that Lilly & Valentine claimed a [71] mortgage on this property?

A. Well, that was at the meeting of November the 17th, our executive meeting.

Q. Were you unaware of the existence of that mortgage before that time? A. Yes, sir.

Q. Did you know that Lilly & Valentine had filed two or three lawsuits against the corporation here in Oregon?

A. I didn't know it at that time.

Q. Had the corporation, to your knowledge, given any express authority to Camozzi to execute this mortgage? A. No, sir.

Q. State whether the directors, to your knowledge, consulted their attorney with reference to the validity of this mortgage? A. Yes, sir.

Q. And what advice did you receive?

A. He advised us that the mortgage couldn't be any good on account that it wasn't approved by the directors of the corporation.

Q. Have you entertained that belief since that time? A. Oh, yes.

Q. In this letter of January 6th, 1949, Defendant's Exhibit 29-a, I call your attention to the following language: "Its mill and millsite"—referring to the Great West Lumber Corporation—"are also covered by a mortgage in the original sum of [72] approximately \$10,000.00." Was it your intention at

(Testimony of Carl Rudeen.)

that time to recognize that mortgage?

A. No, sir.

Mr. Tongue: Just a moment. I object to that. There is no claim that those words are ambiguous, and they speak for themselves.

The Court: I will treat this the same as I did the other. I will receive it subject to the objection.

Mr. Leedy: Q. Were you present at the first time this property was offered for sale?

A. Yes, sir.

Q. At that time was there any mention made or discussion of the Lilly & Valentine mortgage? Just "Yes" or "No." A. Yes.

Q. Now, what mention was made or discussion had at that time, and by whom?

A. Well, Mr. Ellison let us know that this property was covered by a mortgage to Lilly & Valentine, and the discussion at the first meeting wasn't—There was no discussion between him and I at the first meeting, but he did state that the personal property they considered would be covered by that mortgage.

Q. Would be covered by it?

A. No, he said it would not be covered.

Q. Would not be covered by it. At that time was there any reason assigned by him for that statement? Did he say why? [73]

A. Well, not at that meeting; not at that sale, as I recall because we wasn't in a position to bid at the sale anyway, so I wasn't too much interested.

Q. At the time of that first sale had any money been deposited with you under the action of this

(Testimony of Carl Rudeen.)

stockholders' meeting of December 20th, 1948?

A. Not other than what was promised. At that time there was no deposits outside of Mr. Ramseyer's money and my own that we had concluded we was going to put up.

Q. Was Mr. Ramseyer a heavy investor in Great West? A. Yes, sir.

Q. About how large an investment did he have?

A. Oh, \$142,000 altogether.

Q. What was the extent of your investment?

A. Mine run, including the open account or the note, would be \$32,000.

Q. When did you last lend money to this corporation on open account?

A. That was on September the 11th.

Q. What year? A. 1948.

Q. How much money was it? A. \$5,000.

Q. Now, then, the property was not sold at the first time it was offered on December 28th? [74]

A. No.

Q. And you sent out this letter on January 6th, 1949? A. That is right.

Q. Was any money deposited with you pursuant to your letter of January 6th, 1949, Defendant's Exhibit 29-a?

A. After the letter was sent out, yes.

Q. About how much money was deposited with you altogether under those circumstances?

A. That reached a total of \$8900 outside of mine and Mr. Ramseyer's, which wasn't really put up; only promised.

(Testimony of Carl Rudeen.)

Q. Was that deposited with you alone as trustee or with the two of you?

A. Well, the two of us, but I was the most active on account of Mr. Ramseyer had gone to Texas at that time.

Q. Did these checks come to you?

A. Yes.

Q. At that time did you deposit these checks in any bank account? A. No.

Q. What did you do with them?

A. I just held them in my possession.

Q. At that time did you have any funds in your possession belonging to the Great West Lumber Corporation? A. No, sir.

Q. At that time did the Great West Lumber Corporation have any [75] funds, so far as you know?

A. No, sir.

Q. What happened then, after this money was deposited with you?

A. Well, the checks came in at various times, and we had them sent to Mr. Stephan to start with, and in a little while preceding the sale, and getting ready for the sale with these checks, why, I got them from Mr. Stephan. Mr. Ramseyer was in Texas, and just a few days previous to the sale I wired Mr. Ramseyer to make sure that he was still coming in with his money which he promised to, \$10,000, at the time of the sale.

Q. By courtesy of the Bailiff, I hand you Defendant's Exhibits 29-c, -d, -e and -f, and I will ask

(Testimony of Carl Rudeen.)

you whether those telegrams have any bearing upon the situation that existed at that time.

A. Yes, sir.

Q. At the time of the sale on January 27th, 1949, what was the situation as far as Mr. Ramseyer was concerned?

A. He had withdrawn.

Q. What were the conditions under which this money had been deposited with you and Mr. Ramseyer?

A. Well, in the letter, why, we emphasized to these people that Mr. Ramseyer would take the leading part in the operation of the mill. And we also called a meeting of these different people, mostly of whom had put up the money, and also told at the meeting that Mr. Ramseyer would be the operation of the mill with whatever [76] help I could give him under my health condition. And also we pictured that there would have to be raised forty-five to fifty thousand dollars in order to operate the mill. So when Mr. Ramseyer withdrew, that resulted in the fact that we had lost \$20,000 of this contemplated forty-five or fifty, because he was to put up \$20,000, which he promised these people. And we also lost the services of Mr. Ramseyer, which he promised to do in the operating of the mill.

Q. Then at the time of the sale on January 27th, 1949, what was your belief as to whether you could use this money or these checks which had been deposited with you and Ramseyer as trustees for the purpose of bidding at this sale?

(Testimony of Carl Rudeen.)

Mr. Tongue: I object to that question as immaterial, what his belief was.

Mr. Leedy: I think it is proper for the purpose of showing what was done and why it was done.

The Court: I am inclined to think that I will let it go in. As a matter of fact, there was a good deal of this I let go in on the other side, so I think this will balance it.

Mr. Tongue: Very well.

Mr. Leedy: Q. Do you understand the question?

A. No; I didn't even understand the Judge.

The Court: That is not necessary.

Mr. Leedy: Will you read the question.

(Last question read.) [77]

Mr. Tongue: Just a second. Is this the second sale you are referring to?

Mr. Leedy: Yes.

A. Well, immediately I consulted with Mr. Stephan, the attorney there at Twin Falls.

Q. Then what was your belief, Mr. Rudeen, at the time of the sale?

A. My belief was that the fact that this money had been gathered, especially through the mails and through the representations of this letter that Mr. Ramseyer would take the leading part in the operation of the mill, I figured it was a false representation to these people after Mr. Ramseyer had withdrawn.

Q. What would be a false representation?

A. This letter was a false representation, because we had represented to them that Mr. Ramseyer would

(Testimony of Carl Rudeen.)

put in at least \$20,000 and be in the operation of the mill.

Q. Under those circumstances what was your belief as to whether you could use the money?

A. Well, I believed that we daresn't use the money.

Q. Then coming to the actual sale itself, what discussion or mention, if any, was made of the Lilly & Valentine mortgage at the sale on January 27th, 1949?

A. That is at the sale?

Q. Yes.

A. Well, after Mr Ellison had read off the property list which [78] he was selling and got down to the point of offering it for sale, why, after he had read this, he also stated that there was a mortgage against this property by Lilly & Valentine, and then it was the belief of the Internal Revenue Department, the attorneys of the Internal Revenue Department, that none of the personal property of the sale would be covered by this mortgage. And I asked him immediately after he quoted that if he would guarantee that this personal property would not be covered by the mortgage. "Well," he says, "we will back it up with our legal staff." "Well," I says, "that doesn't do me much good." I says, "Couldn't you guarantee that that mortgage does not cover the personal property?" And at that time he said, "Yes, I will guarantee that."

Q. Then what happened?

A. He went ahead and offered it for sale, and of course asked for a minimum bid of \$12,500.

(Testimony of Carl Rudeen.)

Q. We are not concerned about the details unless they involve this mortgage, Mr. Rudeen. It is admitted here that you became purchaser at that sale.

A. Yes.

Q. Now, was anything said at that time about your capacity or for whose account you were making this purchase?

A. Yes, sir.

Q. What was said, and by whom?

A. Mr. Balentine, when I made the first bid, which was \$5,000, asked me—— [79]

Q. You mean Mr. Balentine?

A. Mr. Ellison asked me if I was bidding that in behalf of the trustees or individually. I says, "I am bidding that individually."

Q. Were the certificates of sale issued to you individually?

A. Yes, sir.

Q. Then after you had become the successful bidder, I take it you wrote—It is admitted here that you wrote this letter of February 17th, 1949, which is in evidence here as Defendant's Exhibit 29-b. You recall that?

A. Yes, sir.

Q. What was your purpose in sending out that letter?

A. The purpose in sending out that letter was to recover these funds that we dare not use in bidding at the sale, and asking them to come back and participate in forming a new organization.

Q. At that time did you want these people to come in and participate?

A. Oh, yes; very much so.

Q. At that time were you willing to turn over the

(Testimony of Carl Rudeen.)

benefit of whatever there might be in this purchase which you had made? A. Yes, sir.

Q. Now, did you get any response to this letter of February 17th? A. Yes, sir.

Q. What response did you get?

A. They all gave me powers of attorney to go ahead and use the same checks that I still had in my possession, excepting one. [80]

Q. At that time what was Mr. Ramseyer's position in the matter?

A. He then cut his fund down to \$5,000, which he sent finally with a promise that he would contribute another five, but not over \$10,000.

Q. What ultimately became of the program which you were working on in your letter of February 17th, Defendant's Exhibit 29-b?

A. Well, I was waiting all this time for Mr. Ramseyer to come back from Texas, and before he did—or after he came back from Texas, why, he withdrew his money again and told me that he would not participate in the operation of the mill.

Q. What is the fact as to whether your second plan had been predicated upon his management?

A. That is right; the same thing.

Q. Then what did you do with this money which you had in your possession?

A. I returned the checks to each of the fellows that I had, and I wrote them a letter and asked them to participate.

Q. Are you referring now to this letter, a copy

(Testimony of Carl Rudeen.)

of which is in evidence here as Defendant's Exhibit 29-c? That is a handwritten letter.

A. Yes, sir.

Q. In response to that letter was any money put in your hands as trustee for the purpose of operating this mill? A. No, sir.

Q. At this time do you hold any money of any person whomsoever [81] that has been put up with you as trustee or otherwise in connection with this purchase? A. No, sir.

Q. Whose funds are in those certificates of purchase in that sale? A. My own.

Q. Now, going back here just a little bit, Mr. Rudeen, to the meeting of stockholders of December 20, 1948, at that time was there any discussion of the Lilly & Valentine mortgage?

A. That is the stockholders' meeting?

Q. Yes. A. Yes, there was.

Q. And referring to the meetings called in your letter of January 6th, were those meetings actually held? A. Yes.

Q. Now, there was one called, according to this letter, for January 12th, 1949, at the Park Hotel, Twin Falls, Idaho. Were you present at that time and place? A. Yes, sir.

Q. Were there any interested persons there?

A. Oh, yes.

Q. How many attended?

A. I believe we figured about thirty.

Q. Were they stockholders or creditors, or both?

(Testimony of Carl Rudeen.)

A. Stockholders mostly. There may be a creditor or two. [82]

Q. Were any of those present at that meeting among those who ultimately put up the money?

A. Yes.

Q. Were any of those at the meeting on December 20th among those who put up money?

A. Well, you are talking about the December 20th meeting now?

Q. No, I am talking about the meeting on January 12th at the Park Hotel at Twin Falls.

A. Oh yes. They put up money.

Q. Some of them there put up money?

A. Yes.

Q. Were any of those at the stockholders' meeting on December 20th among those who put up money? A. Yes.

Q. Did you attend this meeting which was called for January 15th, 1949, at the Deschutes County Court House in Bend? A. Yes.

Q. Were there any persons present at that meeting? A. Yes, sir.

Q. About how many?

A. There were about twenty.

Q. Were they stockholders or creditors?

A. Well, I believe all creditors.

Q. Did any of those people deposit money with you on this program? [83] A. No, sir.

Q. Was there any discussion at the meeting of January 12th at the Park Hotel about the Lilly & Valentine mortgage? A. Yes, sir.

(Testimony of Carl Rudeen.)

Q. What discussion was had there concerning it?

A. Well, we explained to them about the mortgage. A few of the directors were there, and we told them how the mortgage was and related that the by-laws called for the approval of any mortgage to be approved by the Board of Directors, which this wasn't, and that we considered that the mortgage would be illegal.

Mr. Tongue: This was on the 16th?

Mr. Leedy: This was the meeting of January 12th.

Mr. Tongue: In Idaho?

Mr. Leedy: In Idaho.

Q. Was there any discussion at the meeting in Bend on the 15th about the mortgage?

A. Yes, sir.

Q. What discussion was had there?

A. The meeting there, we related—or I did; I was the only director there at that time—I related to them that we figured the Valentine mortgage wasn't any good on account of it had not been approved by the Board of Directors.

Q. Did you still have faith in the operation of this sawmill, the Great West Lumber Corporation?

A. Yes, sir. [84]

Q. You believed it could be operated at a profit?

A. Yes, sir.

Q. What was your purpose in all of this activity, then, in which you engaged that you have related here?

A. Well, my whole activity most all winter was

(Testimony of Carl Rudeen.)

to try and get the mill into operation again, to make profits to offset our losses.

Q. Was it your purpose or intention to acquire that mill at less than its fair value?

A. No, we were willing to bid a fair value at the sale.

Q. From what source, then, did you expect to recoup your losses?

A. By the operation of the mill.

Mr. Leedy: You may cross-examine.

Cross Examination

By Mr. Tongue:

Q. Mr. Rudeen, you have testified that you didn't know about this mortgage until November of 1948; is that right? A. November the 17th, yes.

Q. Did you know that the mortgage was recorded in Klamath County in the early part of August?

A. We learned it at that time. We learned that it was recorded at that time.

Q. You learned in November that it was recorded in August; is that right? A. Yes, sir. [85]

Q. Now, you say that later you discussed the mortgage with your attorney, and you decided that it was invalid because it was not authorized by the Board of Directors? A. That is right.

Q. When was that discussion?

A. Oh, I would say we discussed that with him more than once. That was from December the 17th on.

Q. After you first learned of the mortgage in No-

(Testimony of Carl Rudeen.)

vember did you and the other directors take any action with reference to the mortgage?

A. No, sir; not that I know of. I at least didn't know it.

Q. None of the directors took any action with reference to the mortgage, did they?

A. I don't think they did.

Q. And no action was taken on behalf of the corporation after the directors learned of the mortgage in November, according to your testimony, did they?

A. Well, I wouldn't know what you include in action there. You mean legal action?

Q. Well, did you communicate with Lilly & Valentine, the holders of the mortgage, in any way after you learned of the mortgage?

A. Well, not until after the sale.

Q. After the sale did you communicate to Lilly & Valentine any of your doubts as to the validity of the mortgage?

A. Yes, sir. [86]

Q. When? A. The day after the sale.

Q. The day after the sale?

A. With Mr. Balentine. I never approached Lilly and Valentine.

Q. That was the day after the sale?

A. Yes. I am quite sure it was the day. If it wasn't, it was the second day after the sale.

Q. Now, you say that Mr. Stephan advised you on the writing of these letters and as to these various attempts at reorganization and rehabilitation of this business; is that right?

A. He only wrote and helped dictate the first let-

(Testimony of Carl Rudeen.)

ter. The second and third letter was my own dictation.

Q. Did you consult Mr. Stephan after writing the first letter?

A. After writing the first letter?

Q. After writing the first letter, yes.

A. About what?

Q. About what you should do with reference to the use of these funds?

A. Oh, yes.

Q. Didn't he advise you continuously?

A. What?

Q. Didn't he advise you continuously? That is, as to what you should do?

A. Yes, sir.

Q. Concerning this plan and how to try to work it out? [87]

A. Yes, sir; more or less.

Q. Was he not at that time the attorney for the Great West Lumber Company?

A. Well, I don't think that he considered that he was attorney. He had been connected as attorney for the Great West.

Q. Had he ever been discharged as attorney for the Great West Lumber Company?

A. Not that I know of.

Q. Now, you testified that you estimated that forty-five or fifty thousand dollars would be necessary for the purpose of bidding in this property; is that right?

A. Well, for the bidding in and the operation for a short period.

Q. I see.

(Testimony of Carl Rudeen.)

A. We figured two weeks' operation.

Q. What did you figure it would cost to operate the mill for that period?

A. We figured the first two weeks' operation we wanted a reserve of \$20,000, for two weeks' operation.

Q. What were you going to use the other \$25,000 for? A. For the purchase of the mill.

Q. You say that you were willing to pay a fair price for the mill? A. That is right.

Q. What did you consider the mill worth at that time? [88]

A. Well, I had made up my mind before the sale that I would not bid—I wouldn't bid the \$10,000. As a matter of fact, I figured \$7500 was a fair price for the mill.

Q. What were you going to do with the difference between \$7500 and the twenty or twenty-five thousand dollars?

A. Well there was some accounts that had to be taken care of there in preparation to get ready to operate.

Q. Didn't that include this mortgage, Mr. Rudeen? A. No, sir.

Q. I call your attention to Defendant's Pre-Trial Exhibit 30-c, which purports to be a list of accounts payable as of December 15, 1948. I call your attention to the fact that Lilly & Valentine is listed as one of those accounts. A. Listed as what?

Q. As one of those accounts.

A. Yes, sir.

(Testimony of Carl Rudeen.)

Q. Was it a fact, then, that they were considered at that time as being owed the amount shown in that exhibit?

A. It was shown on this—This is a list that Camozzi made up. We asked Camozzi—This was what we was trying to get for nearly a month, the final figures on how much this corporation owed. And even this wasn't final. If you will note at the bottom there, we still added in pencil marks as we learned about other accounts, and the total amount finally resulted to about \$150,000.

Q. As shown there by your pencil additions; isn't that right?

A. What?

Q. As shown by your pencil additions?

A. Yes.

Q. But you didn't strike anything out, did you?

A. Out of this here?

Q. Yes.

A. No, sir. We reviewed it and we did find that most of the accounts was understated here. That is, not most of them, but I would say quite a few of them.

Q. That is the list that was used as a basis for sending out those letters to creditors and stockholders, was it not?

A. No, sir.

Q. You don't deny, however, that your letter of January 6th was sent to Mr. Lilly and Valentine?

A. Yes, sir; it was. We used—I want to state we used this list to get the names of the creditors.

Q. That is what I mean.

A. In order to send them the letter. That is, for name only.

(Testimony of Carl Rudeen.)

Q. What bills did you plan to pay?

A. Only those that was necessary to operate.

Q. What were those bills? Can you name them?

A. Well, for one we figured that we would have to give Moty & VanDyke a few hundred dollars in order to use their motor out there at the mill installed, for one. And I can't recall too many. There was title notes on some of the—title notes on [90] some of the office supplies that had to be paid immediately, and there was a title note on the Ford truck that we wanted to pay to bring that up to date.

Q. In what amount? What were you going to pay on that?

A. Well, the amount of the bill was \$2700, but I believe it took right at a thousand dollars to bring the payments up to date.

Q. Anything else? A. Yes.

Q. What else?

A. I just can't recall. Oh, there was several items there that was necessary to clean up in order to operate. And, besides that, we figured that we would have to have a few men there to get our mill ready for a year's operation, which we figured in the neighborhood of a thousand dollars.

Q. Wasn't that included in the other item that you referred to as being necessary to operate for two weeks? A. Yes, that is right.

Q. Rather than in this item of money that you were going to devote to paying bills?

A. Well, we didn't aim to pay—We didn't aim to

(Testimony of Carl Rudeen.)

pay only the bills that we had to pay in order to start operation.

Q. Isn't it a fact, now, Mr. Rudeen, that at the time this letter of January 6th was sent out you intended to pay Lilly & Valentine's mortgage?

A. No, sir; absolutely not.

Q. You still say that although in your letter it is stated that the property was subject to a mortgage for \$10,000——

A. Yes, sir; I do say that.

Q. ——you did not advise the stockholders and creditors of your position that the mortgage was invalid, did you?

A. We had to relate that there was a mortgage on this property to these people. We couldn't deny that there was a mortgage recorded, but we couldn't write them a letter and then have them come back and find out that there was a mortgage here recorded.

Q. But previously you had been advised by your attorney that the mortgage was void, hadn't you?

A. He didn't say it was void. He said that is wasn't a legal mortgage.

Q. That is right. A. Yes.

Q. He had advised you that it was not a valid mortgage? A. That is right.

Q. And yet, after that advice, you wrote to these stockholders and creditors and told them that there was a mortgage in the amount of \$10,000 on your property; is that right?

A. We had figured that we would probably have to go through court to prove that that was an invalid

(Testimony of Carl Rudeen.)

mortgage. We couldn't do anything else, only let the creditors know that there was a mortgage on [92] that.

Q. Did the people that left money with you ask that it be returned?

A. I didn't get straight on that.

Q. Did the people that contributed money, left it with you as trustee, ask that the money be returned to them?

A. Did they ask for it?

Q. Yes. Was it their idea or your idea that the money be returned?

A. No, that was their idea.

Q. Did they write to you and request that?

A. No, but some of them stopped their checks at the bank. There was some wrote, also.

Q. You still had over \$7500 of that money at the time of the sale, did you not?

A. At the time of the sale?

Q. Yes. A. Yes, sir.

Mr. Tongue: Your Honor, rather than encumber the record in view of the lateness in time, we have taken the deposition of this witness and if we may refer to that it will be sufficient for cross examination of this witness.

Redirect Examination

By Mr. Leedy:

Q. Just about one or two questions in redirect. Mr. Rudeen, whose obligations are these that are listed on this statement of [93] December 15th which you have before you?

A. Great West.

(Testimony of Carl Rudeen.)

Q. And will you state whether or not in raising this money you contemplated buying the open accounts of the Great West Lumber Corporation?

A. Only those that—to save the property that was tied up in the mill. They had title notes, only title notes, that they was to use that property.

Mr. Leedy: That is all.

Recross Examination

By Mr. Tongue:

Q. I have two questions I overlooked, Mr. Rudeen. You testified that you consulted your attorney before the sale as to the validity of this mortgage, isn't that right?

A. Yes, before the sale.

Q. And you say that at the sale you asked Mr. Elison if he would guarantee that the personal property would go to you under the tax sale free from the mortgage?

A. He voluntarily told that first. He voluntarily—He is the way that was: He voluntarily told—I didn't ask him about the personal property; he volunteered that and told me that the mortgage would not cover the personal property, and then I asked him if he would guarantee that.

Q. Yes.

A. But I had to ask him the second time before he related that [94] he would.

Q. Now, when you got the tax certificates from the Government for that sale designated as Defendant's Pre-Trial Exhibits 27 and 28, was there any refer-

(Testimony of Carl Rudeen.)

ence in those certificates to any such guarantee?

A. No, sir.

Q. Didn't they simply purport to sell the taxpayers' interest, such as it was, in the property?

A. Well, I don't know. They were selling—

Q. When you saw those certificates without any guarantee did you ask Ellison to rewrite them and put the guarantee in the certificates?

A. No, sir.

Mr. Tongue: That is all.

Mr. Leedy: That is all.

(Witness excused.)

CHARLES SCOTT

was thereupon produced as a witness in behalf of the Defendant Rudeen and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Leedy:

Q. Where do you reside, Mr. Scott?

A. Riverside, California.

Q. Were you employed by the Great West Lumber Corporation? A. Yes.

Q. Over what period of time?

A. From the inception of the corporation until it went out of existence.

Q. That would be from about November of 1946 until what time? A. Until December of 1948.

Q. And what was the nature of your employment by that corporation?

(Testimony of Charles Scott.)

A. I was employed as bookkeeper for the corporation until January of 1948, and after that time I was in the field as Mr. Camozzi's assistant.

Q. Will you state whether or not you were generally familiar with the corporate activities at this sawmill in Klamath County, Oregon? A. Yes.

Q. Now, by courtesy of the Bailiff, I hand you Defendant's Exhibit 25, purporting to be the levy of December 9th, 1948, upon [96] the personal property out there. I hand it to you so that you will have before you the list of personal property which was admittedly sold by the Government under that levy on January 27th, 1948. I would like to ask you to go down the list of the personal property and say with respect to each item whether that is a part of the sawmill or whether it is a part of some machine in the sawmill, or whether it is something apart from the sawmill. In that connection I also, if the Marshal will help me, hand you the mortgage to Lilly & Valentine, Plaintiffs' Exhibit 10, which describes, I think, some of the major items in the sawmill. Then, if you will take that first item on the tax sale list—That is 350,000 feet of lumber; is that correct? A. Yes.

Q. Now, would that be any part of the sawmill?

A. No.

Q. 1948 Ford truck.

Mr. Tongue: Just a moment. May it be understood that we do not concede the propriety of this testimony, but since it may be of some assistance in clarifying the matter, we are willing to let it go in for what it may be worth.

(Testimony of Charles Scott.)

Mr. Leedy: I would like to state for the record, if I may, the purpose of this testimony is this: That the Court will notice among the issues and the contentions of the parties the question of the sufficiency of the description in the Lilly & Valentine mortgage. If it should be held to be a valid mortgage [97] and the Court is called upon to make a decree of foreclosure, the Court will need to identify the items which would be included in that decree. And Mr. Scott knows what these items are, and whether they are a part of the sawmill, and he can tell us what they are better than anyone else. It seems to me that both from the standpoint of the plaintiffs as well as ourselves and the Court it would be very helpful.

Mr. Tongue: This witness is simply an accountant. He is not a sawmill operator. We do not concede his qualifications to express those opinions but, as I say, we are willing to let the testimony go in for whatever it may be worth.

The Court: Received subject to the objection.

Mr. Leedy: In view of Mr. Tongue's attitude, I will take up a different line of testimony and abandon that.

Q. Mr. Scott, out at that sawmill of the Great West Lumber Corporation were there substitutions of items of machinery and equipment from time to time? A. Yes.

Q. Can you recall any major substitution or replacement which was made after August 4, 1948?

Mr. Tongue: Counsel, there is just one item, and it is the subject of stipulation in our pre-trial order, as I recall.

(Testimony of Charles Scott.)

Mr. Leedy: I think this is in line with the issues, Your Honor.

The Court: All right. [98]

The Witness: Would you state the question again?

Mr. Leedy: Whether there was any major change or replacement in equipment after August 4th, 1948?

A. One major change was the replacement of the 140-horsepower Hercules motor, which was replaced by a new motor from Moty & VanDyke at Bend.

Q. What happened to the old motor?

A. The old motor was turned in to be rebuilt.

Q. Do you know whether the new motor was purchased outright?

A. It was purchased on a sales contract to the First National Bank at Bend.

Q. Could you identify that new and old motor if they appear on this list in the exhibit which you hold in your hand?

A. Only the new motor. I don't believe the old motor is listed here, because it was not present on the premises at the time this was made. The new motor, I believe, is this 140-horsepower Hercules motor.

Q. Now, referring to the mortgage, to the first item, "2 circular saw headrakes." Do you know what a headrake is?

A. No. They must refer to a headrig.

Q. Can you designate upon the list, the detailed list of personal property, the items which would be

(Testimony of Charles Scott.)

included under the description "Circular saw head-rigs"?

A. Yes. The items which read, "Small head rig and carriage," and "Big head rig and carriage."

Q. Referring to the last item on that page, "1 double head." Does that have anything to do with a headrig?

A. "1 double head." I can't identify that. It seems like it might be a duplication.

Q. Then the next item above it, "Steam Nigger."

A. That is part of your large headrig.

Q. Can you pick out any other items on that list of personal property which would be included in "Circular saw headrigs"?

A. No, I cannot.

Q. And the item referred to in the mortgage as "Edger," can you pick that out in the list of personal property?

A. Yes. The edger is referred to here in about the middle of the page.

Q. By the same term, "Edger"?

A. Yes, edger.

Q. And the term, "Automatic trim saw" in the mortgage, do you find that in the list?

A. Just below the edger there is an item "Trim Saw."

Q. That would be the same item?

A. Yes.

Q. The next item in the mortgage is "Conveyors" and "Conveyor Chains," two items. Can you identify on the list of personal property the items that would be so described?

(Testimony of Charles Scott.)

A. "Waste Conveyor," but that is all.

Q. Now, directing your attention to the item about the center [100] of the first page of the list of equipment, "Log haul chain and equipment," is that part of the sawmill proper? A. Yes.

Q. What about these "2 boilers, straw burners," down there? Are they part of the sawmill property?

A. The two boilers actually was on the outside of the building. However, they are the power that generates the function of the large headrig.

Q. Directing your attention to the second page of the list of personal property, "1942 Diamond T truck," and "1936 Dodge truck." Would those be part of the sawmill?

A. Well, I expect that those are not a part of the sawmill.

Mr. Leedy: Does that apply also to the Caterpillar and the other items on that page, the office equipment?

Mr. Tongue: Yes.

Mr. Leedy: Q. Is there an item of "Pond saw" anywhere in that list of personal property?

A. I don't see any designation of pond saw. It may be this Wisconsin 6-horsepower motor, air-cooled—I believe that is the pond saw motor. However, that is the only description made of it here. That might be it.

Q. Was there any substitution or addition made out there in the summer of '48 in connection with the boilers or the steam supplies?

(Testimony of Charles Scott.)

A. There was an auxiliary boiler added late in the summer of 1948. [101]

Q. Are you able to say whether or not that was before or after August 4th?

A. I am not able to say definitely. It was near that date, however.

Q. Were there any minor replacements made at about that time?

A. None, with the exception of belts and routine replacements in machinery.

Mr. Leedy: That is all.

Cross Examination

By Mr. Tongue:

Q. Mr. Scott, referring to the list of personal property which has been placed in your hands, I call your attention to the item entitled "Hercules 3 kilowatt generator." Do you know what that piece of equipment is?

A. I don't see it here. Let's see—Oh, yes; right at the top. That is a motor generator that was used to generate the lights, the light plant for the mill.

Q. It was a part of the mill, was it not?

A. No, it wasn't set inside the building. In fact, this motor set probably 100 feet away from the building.

Q. The mill could not be operated without it, could it?

A. Not when the lights were needed.

Q. Now, the next item, "1 Koehler 11½-kilowatt generator,"—What was that item?

(Testimony of Charles Scott.)

A. That was an auxiliary generator which was used in connection [102] with the one which you have mentioned above.

Q. They are for the same purpose?

A. Yes.

Q. Now, referring to this item, "1 Model HXE6-cylinder motor stand and transmission." Do you know what that was?

A. I am not able to identify that.

Q. Isn't it a fact that there were several motors used for the operation of various equipment in the mill?

A. Yes.

Q. And isn't it a fact that this is one of those motors?

A. It could be.

Q. Isn't it a fact that the next four items, including the 120-horsepower motor, 120-horsepower motor, 35-horsepower clutch, and the Hercules motor and the Convey motor, were all used to operate equipment that was a part of the mill?

A. They were used in the function of the mill.

Q. Now, "Red Seal motor for log haul," wasn't that used for the hauling of logs into the mill?

A. That was used to raise logs from the pond into the mill.

Q. And, as such, it was a part of the mill, was it not?

A. Yes, it was a part of the mill operation.

Q. And then the items, "Chrysler industrial 8-cylinder motor," and "Green chain motor,"—Weren't those motors used to operate machines that were part of the mill?

A. Yes. [103]

(Testimony of Charles Scott.)

Q. And isn't it a fact that the green chain which is referred to here, capacity 80,000 feet, is a conveyor?

A. Ordinarily your conveyor is used to—is referred to as to convey the waste material from the mill.

Q. The green chain is part of the mill, isn't it?

A. That is right.

Q. You couldn't operate a mill without a green chain? A. No.

Q. Now, this Wisco 6-horsepower motor, and the two water pumps, and motor jammer following that,—isn't it a fact that those pieces of equipment were also used to power machinery in the mill?

A. No, this Wisconsin motor, this 6-horsepower motor was used as a pond saw motor, I believe.

Q. Was it that rather than the 22-horsepower Wisconsin motor that was the pond saw motor?

A. Yes, I believe that is correct.

Q. So you correct your previous testimony?

A. I believe I stated the Wisconsin 6-horsepower motor.

Q. Then the 22-horsepower motor was used in the mill; is that right?

A. Yes, I believe that is correct.

Q. And the water pumps and the motor jammer for log haul were used in connection with the mill?

A. They were used to discharge logs from the logging trucks, [104] to discharge logs from the trucks into the mill pond.

Q. I see. Now, the lathe machines, were those

(Testimony of Charles Scott.)

used in connection with the operation of the mill?

A. They were in the mill; in the shop.

Q. I see. Were they used to repair mill equipment?

A. They were used in that capacity whenever possible.

Q. Now, the "Single head," is that a repetition of the reference to the headrigs, or is that another piece of equipment?

A. I believe that is a repetition of the above.

Q. Now, "Saws and filing equipment,"—Does that refer to saws used in the mill and filing equipment to keep those saws in condition?

A. Yes. They were the saws—they were replacement saws which were kept there at the mill to replace saws in the event that there was a damage to the saws, and the filing equipment was part of the shop equipment.

Q. That is all with reference to the saws used in the mill? A. Yes.

Q. And the "Aluminum covered mill building,"—That is the building that houses the mill?

A. That is the building; that is correct.

Q. Was that on skids? A. No.

Q. Was it attached to the real property?

A. It was. It had a cement foundation for the pillars, which it [105] was set in.

Q. Were these motors bolted to the building, or fastened in any way to the building?

A. Only, I believe, by the bolting—I believe the motors, as a general rule, were also placed on a concrete foundation.

(Testimony of Charles Scott.)

Q. Bolted down? A. Yes.

Q. Bolted down to the concrete foundation?

A. Yes.

Q. Now, this "Jammer mounted on Mack frame."

What is that? Is that used in logging?

A. That was used in the logging.

Mr. Tongue: Yes. That is all.

Mr. Leedy: That is all.

(Witness excused.)

Mr. Leedy: That is the Defendant Rudeen's case, Your Honor.

Mr. Tongue: I think that we covered the matter in our direct case, and I have no further rebuttal to offer, so that completes the testimony.

Now, Your Honor, if it meets with the approval of the Court, I think counsel are willing to submit this matter on briefs in any manner that you may suggest.

The Court: Well, I have no convenience, particularly, but the convenience of the attorneys. I won't be able to reach this [106] for some little time.

Mr. Tongue: May we have two weeks to file an opening brief, with two weeks to the defendant to file an answering brief, and we have two weeks to file a reply brief?

Mr. Leedy: That is satisfactory.

The Court: That is agreeable, and then if I feel after that length of time that I still require oral argument I will notify you.

Mr. Tongue: Very well.

Mr. Leedy: We will be happy to argue the matter, if the Court wishes us to, at any time.

Mr. Tongue: As I understand it, and I think it should be a part of the record, it has been stipulated and agreed by and between counsel, and it is my understanding, with the approval of the Court, that these proceedings today do not close the record, and that the plaintiffs reserve the right, if necessary or advisable, to bring in other parties or conduct further proceedings as against the Great West Lumber Corporation itself.

Mr. Leedy: That is correct. Your record so shows, I believe.

The Court: If that is not in the pre-trial order, I think it should be put in there.

Mr. Tongue: In the pre-trial order it states this: "The Great West Lumber Corporation appearing not, and it having been stipulated that, if necessary, further proceedings may be had against said defendant or that additional parties be brought in."

The Court: If that is an agreement, I think that is sufficient.

Mr. Leedy: Yes, I do.

The Court: You will amend the pre-trial order, then, with the suggestions that the Court made this morning as to their being no issue as to payment of the mortgage, and no issue of the presence of per-

sonal property in this county, and you may write those in.

Mr. Leedy: I understood from Mr. Tongue earlier that there has been a small credit on this mortgage, and I think the record does not show it and should show it, if you have that figure, Mr. Tongue.

Mr. Tongue: Yes. We are willing to stipulate that there was an overpayment on the open account for hauling of logs after the execution of the mortgage in the amount of \$453.37, which is entitled to be credited and has been credited on the mortgage. \$300.00 of that amount has already been set forth and is alleged as a credit in the complaint filed in this case.

(Whereupon proceedings in the above matter on June 8, 1949, were concluded.)

[Endorsed]: Filed August 1, 1949. [108]

[Endorsed]: No. 12910. United States Court of Appeals for the Ninth Circuit. Carl Rudeen, Appellant, vs. R. G. Lilly and M. M. Valentine, doing business under the assumed name and style of Lilly & Valentine Trucking Company, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed April 25, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 12910

CARL RUDEEN,

Appellant,

vs.

R. G. LILLY and M. M. VALENTINE, doing business under the assumed name and style of Lilly & Valentine Trucking Company,

Appellee.

STATEMENT OF POINTS

The appellant states that the Points upon which he intends to rely are the same as those that were filed in the District Court of the United States for the District of Oregon and the Points filed in said District Court are hereby adopted in as full and ample manner as if copied verbatim herein.

Dated: June 1, 1951.

/s/ WALTER H. ANDERSON,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 4, 1951. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD
ON APPEAL

To the Clerk of the Above Entitled Court:

Carl Rudeen, appellant above named, hereby designates the portion of the record to be contained in the record on appeal in the above entitled matter the same as the designation filed with the Clerk of the District Court of the United States for the District of Oregon, and said designation as filed in the District Court of the United States for the District of Oregon is hereby adopted as the designation of the record in this Honorable Court.

Dated: June 1, 1951.

/s/ WALTER H. ANDERSON,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 4, 1951. Paul P. O'Brien,
Clerk.

United States
COURT OF APPEALS
for the Ninth Circuit

CARL RUDEEN,

Defendant-Appellant,

vs.

R. G. LILLY and M. M. VALENTINE, doing
business under the assumed name and style of
LILLY AND VALENTINE TRUCKING CO.,
Plaintiffs-Appellees.

BRIEF OF APPELLEES

Appeal from the United States District Court for the
District of Oregon.

HONORABLE JAMES ALGER FEE, *Judge.*

FILED

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NOV 19 1951

PAUL P. O'BRIEN
CLERK

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United States
COURT OF APPEALS
for the Ninth Circuit

CARL RUDEEN,

Defendant-Appellant,

• vs.

R. G. LILLY and M. M. VALENTINE, doing
business under the assumed name and style of
LILLY AND VALENTINE TRUCKING CO.,
Plaintiffs-Appellees.

BRIEF OF APPELLEES

Appeal from the United States District Court for the
District of Oregon.

HONORABLE JAMES ALGER FEE, *Judge.*

Upon reading appellant's brief alone one would gain the impression that the primary questions involved in this case are whether the president and general manager of the Great West Lumber Corporation had authority to execute a mortgage upon its sawmill and whether the

mortgage executed by him was in such form as to be void upon its face.

While these questions may properly be involved in this case it is important to note at the outset that the decision of the trial court in this case also involved the following questions: (1) Whether, even if the initial invalidity of the mortgage be assumed (as strongly denied by appellees), either for lack of authority or otherwise, there was a subsequent *ratification* of the validity of the mortgage by the corporation, and (2) whether defendant Rudeen, by virtue of his position as an officer and director of the corporation and his subsequent conduct in representing to appellees that his purchase of the sawmill would be *subject to the mortgage*, is estopped from and in no position to challenge the validity of the mortgage. (See Findings III, V and VI. R. 46-8.) Of even greater importance, it should be kept in mind that the decision of the trial court may be sustained by its determination on these latter two questions, regardless of the correctness of its decision on the question of the initial authority for and validity of the mortgage.

STATEMENT OF THE CASE

Plaintiff has devoted the first thirteen pages of his brief to a summary of the complaint, answer and reply in this case, but has made no reference whatever to the Pre-Trial Order, which sets forth both the admitted facts, contentions of the parties and issues involved on trial of this case and which, by stipulation of the parties, completely replaced the pleadings (R. 41). For a complete and accurate statement of these matters the attention of the court is thus directed to the Pre-Trial Order (R. 22-41) and to a subsequent amendment to the Pre-Trial Order (R. 42-3). Attention is also respectfully directed to the Findings of Fact by the trial court based upon these admitted facts, contentions and issues and upon the evidence submitted on trial (R. 43-52). These two documents, taken together, present a good understanding of this case. Accordingly, reference will be made to the "Statement of the Case" set forth in appellant's brief only to point out certain inaccuracies, leaving for argument a discussion of certain important facts altogether omitted and ignored by appellant.

Appellant's brief (p. 15) charges Mr. Balentine, one of appellees' attorneys, with preparing a mortgage which he knew to be false because it recited that it was given by authority of the board of directors and referred to attachment of the corporate seal. This is a serious charge and is made without documentation by reference to the record, other than to refer to the face of the mort-

gage itself. Indeed, when a mortgage is prepared by the attorney for a creditor of a corporation, he will normally have no knowledge when the mortgage is prepared as to the detailed facts of authorization for the signing of it by officers of the corporation and must normally assume that its execution has been or will be properly authorized and also that it will be properly sealed upon its execution. Thus the fact that when the mortgage was subsequently executed by Camozzi he may have had no express authority from the directors to sign that particular document and also failed to attach the corporate seal does not establish the serious charge that Mr. Balentine "*drew* this mortgage, knowing that it was false."

Appellant's brief (p. 15) next states that:

"The Great West Lumber Corporation did not receive anything at the time of the execution of the mortgage other than to secure a prior existing debt for a release of the attachment or garnishment against Fleischman's Lumber Co., which had tied up some indefinite amount."

As to this charge it should be necessary only to refer to the Findings of Fact, Paragraph II (R. 45), which makes it clear that the execution of the mortgage was necessary to lift a pending attachment and thus was necessary to enable the corporation to resume sales of lumber and escape the danger of closing its mill, with the result that it was of substantial benefit. For evidence in support of this finding see copies of the record in the attachment proceedings, Ptf. Ex. 5 and 6; the testimony of Mr. Balentine, R. 91-3, and the Pre-Trial Order, par. 19, R. 28.

Appellant also (p. 16) apparently seeks to cast some doubts as to the amount actually due under the mortgage, although it was stipulated that the sum of \$9,-546.63 was due (R. 43) as subsequently decreed by the trial court (R. 54).

Next (pp. 16-17) appellant states that it does not appear where the trial court secured the description of the various items of machinery set forth in the decree as subject to the mortgage. But a complete description of all of such items was set forth in the notice of levy for sale of personal property for delinquent federal taxes (Dft. Ex. 25. See also Ex. 26 and 27) and it was stipulated in the Pre-Trial Order that these items included "all of the personal property described in the purported mortgage" (R. 33). Thus it was simply a matter for the court (based upon the language of these documents and the testimony of Charles Scott, R. 151-160), to determine which of the items to be sold were covered by the mortgage, as discussed below (pp. 33-6).

Finally, appellant states (p. 17) that it does not appear where the court got the figure of \$3,369.32 for taxes awarded to Klamath County or the reason for such an award. This award was based upon stipulation, as stated in the Findings of Fact (R. 50). Apparently, through inadvertence, the written stipulation, filed Feb. 19, 1951 (R. 64) was not included by appellant in the record.

SPECIFICATIONS OF ERROR

Appellant next (p. 17) lists ten "questions presented," followed by eight "specifications of error" raising almost identical issues. It should thus be noted that the appellant's "Statement of Points on Appeal" was limited to the following:

"1. The evidence is insufficient to support the findings of fact.

"2. The findings of fact are clearly erroneous.

"3. The evidence will support only findings of fact leading to conclusions of law requiring a decree for this Defendant in accordance with his contentions herein." (R. 59, 163).

In view of the fact that appellant had previously chosen to limit his appeal to the sufficiency of the evidence to support the findings of fact, it is submitted that Specifications of Error No. 3, 4, 6 and 7 are not properly before this Court, nor are "Questions Presented" No. 3, 4, 7, 8, 9 and 10.

Points and Authorities

1. The mortgage in this case was correctly held to be valid for the reasons that:

a. President and General Manager Camozzi had implied actual authority to execute the mortgage under the peculiar facts of this case, including the fact that he held a majority of the stock and that the other stockholders and directors had become inactive

and had turned over their powers to him and also in view of the emergency presented in this case.

Fletcher, Cyc. on Corporations, secs. 444, 449, 495, 557, 612, 690;

2 Am. Jur., Agency, secs. 89, 442;

19 C.J.S., Corporations, sec. 1062, pp. 593, 596;

Abraham v. American Nt. Bank, 161 Okl. 87;

Nt. State Bank v. Sanford Fork & Tool Co., 157 Ind. 10;

Tyler Estate v. Hoffman, 146 Mo. App. 510;

G. V. B. Mining Co. v. First Nt. Bank, 89 F. 439, aff. 95 F. 23;

Galbraith v. First Nt. Bank of Alexandria, 221 F. 386;

Cunningham v. German Ins. Bank, 101 F. 977;

Farmers' State Bank v. Brown, 204 N.W. 673;

Buchwald Delivery & Express Co. v. Hurst, 75 A. 111;

P. R. Sinclair Coal Co. v. Missouri-Hydraulic Mining Co., 207 S.W. 266.

b. Camozzi also had ostensible or apparent authority to execute the mortgage.

Fletcher, *supra*, sec. 449;

19 C.J.S., Corporations, sec. 1062;

Carstens Packing Co. v. Gross, 131 Or. 580, 584, 283 P. 20;

Thomas v. Smith-Wagoner Co., 114 Or. 69, 79; 234 P. 814;

Gore v. Richard Allen Mining Co., 61 Idaho 622;

Fischer v. Streeter Milling Co. (N.D.), 234 N.W. 392;

G. V. B. Mining Co. v. First Nt. Bank of Halley
(C.A. 9), 95 F. 23, 30;

Merchants' Bank v. State Bank, 10 Wall. (U.S.)
604; 19 L. Ed. 1008;

American Nat. Bank v. Wheeler-Adams Auto
Co., 141 N.W. 396;

Burke v. Frederickson, 268 N.W. 348.

c. The execution of the mortgage was ratified by
the corporation.

Fletcher, supra, secs. 612, 706, 752, 757, 767, 769,
772, 773;

West v. Washington Ry. Co., 49 Or. 436, 445-6;
90 P. 666;

Currie v. Bowman, 25 Or. 364; 35 P. 848;

Reid v. Alaska Packing Co., 47 Or. 215, 220; 83
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Cranston v. West Coast Life Ins. Co., 72 Or. 116,
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Depot R. Syndicate v. Enterprise B. Co., 87 Or.
560, 575; 171 P. 223;

Pettengill v. Blackman, 30 Id. 241;

Burke Land & Livestock Co. v. Wells Fargo &
Co. (Id.), 69 P. 87, 93;

State ex rel v. Merchants' Bank of Weston
(Neb.), 254 N.W. 675;

Ohio & M. Ry. Co. v. McCarthy, 96 U.S. 258;

Dillon v. Myers (Colo.), 146 P. 268, 272;

Edelhoff v. Horner-Miller Straw-Goods Mfg. Co.
(Md.), 39 A. 314;

Banca Italiana Di Sconto v. Columbia Counter
Co. (Mass.), 148 N.E. 105.

Pathe Exchange, Inc. v. McElroy (Mo.), 243 S.W. 430;

Indianapolis Rolling Mills v. St. L. F. S. & W. Ry., 120 U.S. 256.

d. Appellant Rudeen is not in a position to deny and is estopped from denying the validity of the mortgage.

Fletcher, supra, sec. 490;

Norment v. First Nat. Bank (N.M.), 167 P. 731;

Shawmut Comm. Paper Co. v. Overbach (Mass.), 101 N.E. 1000;

Boteler v. Conway (Cal.), 56 P. (2d) 587;

Page v. Savage (Id.), 246 P. 304, 308.

2. The court did NOT err in decreeing payment of taxes to Klamath County.

3. The court did NOT err in including a particular description of the property covered by the mortgage.

36 C.J.S., Fixtures, sec. 46;

First State Bank v. Oliver, 101 Or. 42, 51; 198 P. 920;

Metropolitan Life Ins. Co. v. Kimball, 163 Or. 31, 52-3; 94 P. (2d) 1101;

Kramer v. Alvord, 97 Or. 227, 231; 189 P. 990.

4. The court did NOT err in holding that the mortgage was superior to the title claimed by defendant Rudeen under the tax deed.

a. The mortgage was NOT VOID for lack of a corporate seal.

2-804, O.C.L.A.;

2-807, O.C.L.A.;

Fletcher, *supra*, sec. 2466, 7;

Brown v. Farmers' Supply Co., 23 Or. 541, 32 P. 548;

Schleef v. Purdy, 107 Or. 71; 214 P. 137;

16 Am. Jur., Deeds, sec. 100;

59 C.J.S., Mortgages, sec. 16;

Appellant's Brief, p. 22, point 4.

b. The recording of a mortgage not entitled to be recorded, while not conveying constructive notice, may still operate as actual notice and one who takes a subsequent deed with actual knowledge of such a mortgage cannot complain.

Williams v. First Nat'l Bank, 48 Or. 571; 87 P. 890;

Musgrove v. Bonser, 5 Or. 313;

45 Am. Jur., Records and Recording, sec. 172.

c. Appellant, as a Director of the Corporation, could not upon taking a tax deed claim that the tax lien destroyed the mortgage.

51 Am. Jur., pp. 919-920;

13 Am. Jur., pp. 960, 962;

76 A.L.R. (Anno.) 439;

Enyart v. Merrick, 148 Or. 331; 34 P. (2d) 629.

d. The representations and agreement that the tax sale would be SUBJECT to the mortgage are independent and conclusive answers to the contention that the tax title is superior to the mortgage.

5. Rule that statements of agent not admissible against principal to prove extent of his authority not applicable where, as here, (a) the point is not properly raised on appeal, (b) a third party, rather than principal, is involved, and (c) authority was also proved by other evidence.

Restatement of Law of Agency, sec. 285;

Rule 20(1)(d), Rules of Court of Appeals, 9th Circuit.

ARGUMENT

I. The trial court did NOT err in holding the mortgage to be valid.

A. President and General Manager Camozzi Had Implied Actual Authority to Execute the Mortgage.

Appellant contends that plaintiffs knew or should have known that President and General Manager Camozzi had no authority to execute the mortgage; that “the president or the general manager of a corporation have no authority in themselves *by virtue of their position*, to execute such a mortgage,” which plaintiffs well knew; that they were not entitled “to rest upon the bare assertions of Camozzi himself” and that plaintiffs had the burden to prove his authority (Ap. Br. 25-8).

1. The Facts as to the Actual Authority of Camozzi.

This is not a simple case of a president or general manager of a corporation undertaking, solely by virtue

of his position, to execute a mortgage on its property. In this case it appears from the admitted facts in the Pre-Trial Order and otherwise that Camozzi was not only the president and general manager, but also owned a majority of the common stock (Ex. 19, p. 36) and was the only officer of the company (an Idaho corporation) present in Oregon, where its sawmill was located (R. 24-5); that the other stockholders and directors of the corporation became inactive, it appearing that subsequent to the organization of the corporation in November, 1946, the directors and stockholders each held only one meeting until after the execution of the mortgage on August 4, 1948 (Ex. 1); that other stockholders and directors took no active part in the affairs of the corporation or to supervise the activities of Camozzi, but delegated to him the power to conduct its affairs, and acquiesced in all of his acts until after the execution of the mortgage in question (Ex. 19, pp. 11-12, 19-20, 24-5, 31-2; Ex. 20, pp. 5-6, 40-1; Pre-Trial Order, par. 12, 13, R. 25-6); that the by-laws of the corporation expressly provided that while the Directors should ordinarily have power to buy, sell and mortgage any and all real and personal property, the general manager should have "full control of said business and officers when the Board of Directors is not in session" (Ex. 24, Art. IV, sec. 8, 9); that Camozzi had thus been permitted to purchase all of the equipment for the sawmill as well as all timber and real property, to conduct and direct all of its operations and even to borrow money under a contract committing the sale of the entire products of the sawmill to one purchaser (R. 25; See

also Ex. 4). These facts were, for the most part, found to be true by the trial court. See Finding I (R. 44-5). Appellant has made no attempt to challenge these facts.

It is also admitted that plaintiffs had been hired by Camozzi to haul lumber from the sawmill; that on July 31, 1948, the corporation was indebted to plaintiffs in the sum of \$15,134.97 and that plaintiffs on that day filed two lawsuits, attached all of the lumber of the corporation, including lumber in the hands of the Lawrence Warehouse Company, to whom all of its lumber was to be delivered under contract and received a temporary restraining order stopping all lumber sales (R. 26-7; Ex. 4, 5 and 6). Camozzi immediately came to see plaintiffs and told them that he wanted to settle the matter immediately for the reason that the stopping of lumber sales would close the operation of the mill (R. 27, 73, 92). It was then agreed that the matter be settled by the execution of a note and mortgage and arrangements were rushed through to get the mortgage in question prepared and executed, following which the pending attachments and injunction were dismissed (R. 27-8; 92-5). The mortgage was prepared by Mr. Balentine, attorney for plaintiffs, under instructions from and upon the basis of information given to him by Camozzi, and was recorded on August 5, 1948 (R. 93-5; Ex. 10). It also appears from the foregoing that because of the stopping of all lumber sales and the threatened closure of the mill the corporation was faced with an emergency and that there was not time for Camozzi, in Klamath Falls, Oregon, to convene a meeting of the directors in Idaho pursuant to the By-Laws in order to give express

authorization for the execution of the mortgage and that its execution was of substantial benefit to the corporation by making possible a resumption of lumber sales and by preventing the closing of its sawmill. Again, these facts were found by the trial judge in Finding No. II (R. 45-6) and, it is submitted, are amply supported by the record.

2. Legal Principals on Question of Implied Actual Authority to Execute Mortgage.

The power of an officer of the corporation may rest either upon its organic law as expressed in its articles or by-laws, or upon delegation of authority from it or through its board of directors. Fletcher, *supra*, sec. 557. The directors may delegate to the officers matter involving discretion and judgment. *Id.*, sec. 495. Such a delegation of power may be either express or implied. *Id.*, sec. 557, and this includes the power to execute a mortgage. *Id.* sec. 3115; 19 C.J.S. on Corporations, sec. 1062, p. 593. As further stated in Fletcher, sec 449, "Implied authority is actual authority circumstantially proved."

Thus, although the president of a corporation has no power merely by virtue of his office to execute a mortgage, "such authority may be expressly conferred or *may be implied if he is in charge and control of the management of the company.*" Fletcher, *supra*, sec. 612, citing many cases. As stated in C.J.S., *supra*, p. 596, the power of the president to execute a mortgage:

" . . . *may arise by implication, as from his or their being intrusted with the management and*

control of the corporate affairs or being otherwise held out as having such authority.” (citing many cases) (Emphasis supplied)

As further stated in Fletcher, sec. 690;

“ . . . where a general manager is given practically the powers of the board of directors, or when the board becomes inactive or acquiesces in all the acts of one acting as general manager, a mortgage executed by him is binding upon the company.”

Among the individual cases in which the above quoted rule has been applied to situations similar to this case are the following: *Abraham v. American Nat'l Bank*, 161 Okl. 87 (President left in control of business of corporation); *Nat'l State Bank v. Sanford Fork & Tool Co.*, 157 Ind. 10; *Tyler Estate v. Hoffman*, 146 Mo. App. 510; *G. V. B. Mining Co. v. First Nat'l Bank*, 89 F. 439 (arising in Idaho), aff. 95 F. 23; *Galbraith v. First Nat'l Bank of Alexandria*, 221 F. 386; *Cunningham v. German Ins. Bank*, 101 F. 977; *Farmers' State Bank v. Brown*, 204 N.W. 673; *Buchwald Delivery & Express Co. v. Hurst*, 75 A. 111; and *P. R. Sinclair Coal Co. v. Missouri-Hydraulic Mining Co.*, 207 S.W. 266.

As further stated in Fletcher, supra, sec. 444:

“Oftentimes they (the directors) are mere dummies who hold no meetings for years and acquiesce in the entire management of the corporation by one or more of their number or by some officer . . . ; and where directors permit certain persons to control and conduct the affairs of the company, without protest or objection, the law presumes that all of them knew and acquiesced in what was done, and treats such acquiescence as equivalent to formal authority.”

Finally, on this point, the officer of a corporation may have implied power to act arising out of an emergency to the same extent as the agent of an individual. As stated in 2 Am. Jur. on Agency, sec. 89:

“On like principle, after authority had been conferred on the agent, there may arise such new and unexpected emergencies and necessities as will justify the agent in assuming extraordinary powers which, if exercised in good faith and with sound discretion, will bind the principal; in other words, there may be an implication of authority in the agent to act in such case in order that the agency purpose for which the relation was created may be effectuated. Accordingly, the rule advanced by the American Law Institute in this respect is that if, after the authorization is given, an unforeseen situation arises for which the terms of the authorization make no provision, and it is impracticable for the agent to communicate with the principal, he is authorized, in the absence of an agreement to a contrary effect, to do what he reasonably believes to be necessary in order to prevent substantial loss to the principal with respect to the interests committed to his charge.”

3. Argument in Support of Implied Actual Authority to Execute Mortgage.

In this case the directors of an Idaho corporation admittedly conferred upon Camozzi a free hand to conduct all operations in Oregon (R. 23-5). This alone is sufficient to constitute implied and at least apparent authority under many of the authorities cited above.

But, in addition, Camozzi had been the principal promoter and stockholder of the corporation and was one of the three partners who previously owned and op-

erated the sawmill property (Ex. 19, p. 36; Ex. 1). Moreover, the directors, by holding only one meeting between the formal organization of the corporation in 1946 and after the execution of the mortgage in 1948 (Ex. 1) by failing to hold regular meetings as required by the by-laws (Ex. 24), and by exercising no direction or supervision over his actions and requiring no reports of his activities (Ex. 19, pp. 11-12, 19-25, 31-2; Ex. 20, pp. 5-6, 40-1) had acquiesced in all of his acts, had become completely inactive and had virtually abdicated or at least delegated virtually all of their powers to Camozzi. This is again recognized by clear implication in the resolution of November, 1948, divesting him of his previous "broad powers" and placing him under the direction and supervision of an executive committee, as he always should have been directed and supervised by the directors (Ex. 1). In addition, Barry, as Secretary-Treasurer, virtually abdicated his duties which required him to keep the corporate seal, keep records, keep the funds of the corporation, and submit complete statements of account each year (Ex. 19, pp. 30-1).

Thus, this is clearly a case in which the President and Manager was "entrusted with the management and control of the corporate affairs" and, in addition, a case in which the directors became "inactive and acquiesced in all of the acts of the one acting as manager." It follows, under the authority of C.J.S. and Fletcher, as noted above, together with the cases cited above (page 15), that Camozzi, as President and General Manager, had implied authority to do any act that he thought

necessary or proper for the best interests of the corporation, including the execution of a \$10,000 mortgage.

Indeed the sum total effect of the inaction by the directors and the powers, both delegated to and assumed by Camozzi, was to do no more than to vest in him as manager "*tull control* of the business and affairs of the corporation, when the Board of Directors is not in session," which the directors were authorized to do under Article IV, Sec. 8 of the by-laws (Ex. 24).

Finally, where the president of a foreign corporation is confronted with an emergency such as confronted Camozzi when his sales were stopped and his operations were threatened with an imminent shut-down as the result of the injunction of all sales (see p. 13, *supra*), his act of judgment in executing a small mortgage to enable the company to resume sales and continue operations was not an abuse of discretion and was within the scope of his implied powers to act in an emergency, under the established rule as set forth above.

4. Answer to Appellant's Arguments and Authorities.

Appellant first (pp. 25-6) contends that plaintiffs relied solely upon Camozzi's own statements that he ran the business and that the fact of his lack of authority was called to the attention of plaintiffs, a statement wholly undocumented except for reference to the language in the mortgage referring to authority from the directors and to the affixing of the corporate seal, which was not done. But plaintiffs had a right to assume that

he had secured necessary authority from the directors and the fact that he did not have the corporate seal to affix is not conclusive to the contrary, particularly since the home office of the corporation was far away and in another state. Of more importance, authority of Camozzi is established by reference to the by-laws of the corporation and minutes of its meetings, by the testimony on deposition of its treasurer and of defendant Rudeen and upon other facts, many of which were admitted, and all apart from the statements of Camozzi to plaintiffs.

Appellant next (pp. 26-7) contends that the president or general manager of a corporation has no authority *by virtue of such position* to execute a mortgage covering all of its property, citing *American Nat'l Bank v. Bartlett*, 40 F. (2d) 21, which appellant states to be "almost on all fours." But that case did not involve "a 'one-man' corporation, the board of directors of which has abdicated," as in this case and the court in the *Bartlett* case expressly recognized that a different rule might apply in such cases, as well as in cases in which there had been a ratification of the mortgage (as also was true in this case, as discussed below, p. 23), and that authority, though not expressly given, may arise as a necessary implication from authority that is expressly granted (as also true in this case for reasons pointed out above, p. 14). A reading of the remaining cases cited by appellant (pp. 21-3, points 1, 2, 3, 5 and 7) reveals that they are no more controlling than the *Bartlett* case, and do no more than support the general proposition that a president or general manager cannot, *by virtue*

of such position alone, execute a mortgage, whereas in this case, for reasons pointed out above (pp. 16-18) there is much evidence, both direct and circumstantial, supporting the authority of Camozzi to execute this mortgage other than and in addition to the fact that he was president and general manager.

For the same reasons, the fact that plaintiffs' attorney, Mr. Balentine, was aware, as appellant next contends (p. 27) of the limitations upon the power of a president *in the usual case* to execute a mortgage and of the usual custom to affix the corporate seal, since he testified that, in his opinion, Camozzi had authority to execute this particular mortgage under the facts of this particular case (R. 107), and that opinion is fully supported by reference to the foregoing facts and authorities.

Finally, on this point, appellant contends (p. 28) that plaintiffs had the burden to establish the authority of a general manager to execute a mortgage upon corporate assets. But the general rule is to the contrary and places the burden on those who would deny that a corporate mortgage was properly authorized in view of the presumption of validity of such mortgages. 2 Am. Jur., Agency, sec. 442. In any event, the evidence in this case, and as set forth above, fully sustained any burden that plaintiffs might have had to prove the authority for the execution of this mortgage and fully supports the findings of the trial court on that point (R. 44-6). Indeed, it is significant that appellant does not challenge any of the facts set forth in Findings I and II, other than the alternate finding that Camozzi had authority to execute the mortgage.

B. Camozzi Also Had Ostensible or Apparent Authority to Execute the Mortgage.

In addition to the *implied actual* authority of Camozzi to execute the mortgage, its validity is also sustained by his *apparent* authority. The general rule on apparent authority of the officer of a corporation is stated in Fletcher, sec. 449, p. 257, as follows:

“If a corporation, . . . or its directors, either intentionally or negligently, clothe a particular officer or agent with an apparent authority to act for it in a particular business or transaction, and persons deal with him in good faith, it will be bound to the same extent precisely as if such apparent authority were real.”

and, on p. 264:

“The public is compelled to rely upon the apparent authority of the conceded agents of such corporation, especially where, as managers or superintendents, they are placed in control of departmental affairs.”

As stated in *Carstens Packing Co. v. Gross*, 131 Ore. 580, 584; 283 Pac. 20:

“One dealing with a corporation must deal with its agents. He has a right to rely upon the apparent scope of the agents power.”

See also 19 C.J.S. on Corporations, sec. 1062, p. 593. Here again, the burden of proof falls upon defendant. *Thomas v. Smith-Wagoner Co.*, 114 Ore. 69, 79; 234 P. 814, which also holds that the question to be decided in such cases is whether innocent third persons are reasonably justified in believing that the agent has author-

ity to do the act in question. (Id. at 73.) And the same evidence that tends to show implied authority may actually show apparent authority. Fletcher, sec. 449, p. 256.

Thus, the following cases, among others, hold that under facts similar to those involved in this case, as where the directors left the conduct of the business in the hands of the president, there was apparent authority to execute a mortgage: *Gore v. Richard Allen Mining Co.*, 61 Idaho 622; 105 P. (2d) 735; *Fischer v. Streeter Milling Co.* (N.D.), 234 N.W. 392 (dicta); *G. V. B. Mining Co. v. First Nat'l Bank of Halley* (C.A. 9), 95 F. 23, 30; *Merchants' Bank v. State Bank*, 10 Wall. (U.S.) 604; 19 L. Ed. 1008; *American Nat'l Bank v. Wheeler-Adams Auto Co.*, 141 N.W. 396; and *Burke v. Frederickson*, 268 N.W. 348, 352.

As previously stated, evidence of implied authority may also be considered on the question of apparent authority. Thus the same facts summarized above are also to be considered on this issue. In addition, it should be kept in mind that the corporation held Camozzi out as its sole and only representative in Oregon and as the one to make all decisions for the corporation in that State.

Thus, he had previously contracted the entire output of a mill costing over \$200,000 to one purchaser—a decision of far more importance than the execution of a \$10,000 mortgage (R. 25; Ex. 2, 3, 4). He had borrowed money, purchased timber and real property, all equipment for expansion of the sawmill, and had made all

decisions regarding its enlargement and operation and the sale of all of its products, as well as the application of the proceeds of such sales to creditors of the company—all admittedly within the scope of his actual authority from the directors of the company. (Id. See also Ex. 19, pp. 11-12, 19-25, 31-2; Ex. 20, pp. 5-6, 40-1.) The people in and about Klamath Falls, including plaintiffs, knew these things (R. 75, 110-2). So far as they were concerned Camozzi was the Great West Lumber Corporation and had power to do anything that he deemed necessary or proper in connection with its business and affairs. (Id.)

Thus it is clear, under the cases and authorities set forth above, that Camozzi at least had apparent authority to execute the mortgage and that the corporation and all those in privity with it, including defendant Rudeen, are estopped to claim the contrary.

C. The Execution of the Mortgage Was Ratified by the Corporation.

As this Court well knows, even “an unauthorized mortgage or pledge by the president of a private corporation is ratified by the corporation if it acquiesces in or accepts the benefits of the transaction.” Fletcher, sec. 612, p. 528. See also sec. 706, citing many cases, including *West v. Washington Ry. Co.*, 49 Or. 436, 445-6; 90 P. 666. Again, ratification may be either express or implied. Fletcher, secs. 752, 767, and the same rules apply for satisfaction by a corporation as by an individual. Id., sec. 752, p. 773; *Reid v. Alaska Packing*

Co., 47 Or. 215, 220; 83 P. 139. It has also been held that a presumption of ratification arises from failure to repudiate an unauthorized act. *State ex rel Sorenson v. Merchants' Bank of Weston, et al.* (Neb.), 254 N.W. 675, 678. While there must usually be knowledge of the facts by the principal, this requirement is satisfied where there are circumstances which would put a reasonable man on notice as if ignorance was the result of negligence or inattention to duty. Fletcher, sec. 757. As stated in *Cranston v. West Coast Life Ins. Co.*, 72 Or. 116, 130; 142 P. 762:

"If the officers of the company had an opportunity to inform themselves of the facts and circumstances . . . and failed to do so, it would be equivalent to such knowledge."

Furthermore, as stated in Fletcher, sec. 757, pp. 787-8:

" . . . knowledge upon the part of the corporation will be presumed from slight circumstances where it had the benefit of the contract."

Once actual or constructive knowledge is established, the final question is whether the corporation, by its conduct, has ratified the unauthorized act. Such ratification can be implied from accepting the benefits of the contract or in otherwise treating the contract as in force and also, under some circumstances, from silence or acquiescence or failure to disaffirm the contract. Fletcher, sec. 767.

As further stated in Fletcher, sec. 769:

"When the officers or agents of a corporation exceed their powers in entering into contracts or

doing other acts, the corporation, when it has knowledge thereof, must promptly disaffirm the contract or act and not allow the other party or third persons to act in the belief that it was authorized or ratified. If it acquiesces, with knowledge of the facts, or fails to disaffirm, a ratification will be implied, or else it will be estopped to deny a ratification."

and later:

"After knowledge of the unauthorized contract the corporation must repudiate it within a reasonable time or else consent and approval will be presumed to have been given to the officers act or contract."

As the rule has been stated in Oregon in *Depot R. Syndicate v. Enterprise B. Co.*, 87 Or. 560, 575; 171 P. 223:

"If a principal, when fully notified thereof, neglects promptly to disavow an act or contract of his agent in excess of his authority, such silence will usually be interpreted as an implied ratification, and particularly so, if the failure speedily to repudiate such conduct or agreement might impose upon the other party loss or injury."

In this connection, failure to disaffirm in one, two or three months has been held sufficient to constitute a binding ratification, according to cases cited in Fletcher, sec. 772.

In addition, when a corporation has accepted the benefit of an unauthorized contract, as a general rule it is considered as having ratified the contract, or will be estopped to deny the contract. Fletcher, sec. 773, p. 832, which goes on to state the following rule:

"If benefits have been accepted, the corporation cannot disaffirm the contract without returning or offering to return the benefits received or otherwise placing the contracting party in status quo."

For specific cases on the question of ratification which apply the above rules of law to concrete factual situations and which, although sometimes involving facts different from those of this case, support plaintiffs' position that the corporation must be deemed to have ratified the mortgage, see *Currie v. Bowman*, 25 Or. 364, 376-7; 35 P. 848; *Pettengill v. Blackman*, 30 Id. 241; *Depot R. Syndicate v. Enterprise B. Co.*, supra; *Edelhoff v. Horner-Miller Straw-Goods Mfg. Co.* (Md.), 39 A. 314, 316; *Banca Italiana Di Sconto v. Columbia Counter Co.* (Mass.), 148 N.E. 105, 108; *Pathe Exchange, Inc. v. McElroy* (Mo.), 243 S.W. 430; *Indianapolis Rolling Mill v. St. L. F. S. & W. Ry.*, 120 U.S. 256.

As already stated (pp. 13-4) the whole purpose of the mortgage was to benefit the corporation by making it possible to release the then pending attachments and injunction which had stopped all sales of its products and would have shut down its operations. (See also R. 28.) The mortgage was recorded on or about August 5, 1948, giving notice to all the world (Ex. 10; R. 95). Later that month Rudeen became suspicious of Camozzi, but did nothing and made no investigation. Early in November the directors, including Rudeen, learned of the mortgage, but all they did was to question Camozzi about it (Ex. 1; Ex. 20, pp. 12-3; R. 141-3). No steps were taken to cancel or rescind the mortgage or to

notify plaintiffs of any claim of invalidity. (Id.) In December the attorney for the corporation purportedly advised that it was invalid (R. 141). Still nothing was done by the corporation (R. 142). As stated below, (p. 29) the stockholders and creditors, including plaintiffs, on January 6, 1949, were advised by director Rudeen that the mortgage existed and that the tax sale would be *subject to the mortgage*, with not one word as to any claim of invalidity. No such claim has ever been made to plaintiffs on behalf of the corporation and even Rudeen did not so contend to plaintiffs until long after the tax sale (R. 142).

It is thus submitted that since the corporation had the benefit of the mortgage, had constructive knowledge almost immediately thereafter and actual knowledge early in November, and then remained silent, acquiesced in the matter and took no move to cancel or rescind the mortgage or to notify plaintiffs that it was unauthorized—that under these facts and under the cases and authorities set forth above the corporation must be considered as having ratified the execution of the mortgage and cannot now claim the contrary.

This is particularly a case in which the rights of a creditor who in good faith relinquished such rights acquired under attachments and injunctions for a mortgage should not be destroyed by resort to the technical defense of *ultra vires*, as held in the Idaho case of *Burke Land & Livestock Co. v. Wells Fargo & Co.*, 60 P. 87, 93, involving somewhat comparable facts:

“ . . . the rule is that that doctrine (ultra vires) should not be applied when it would defeat the ends of justice or work a legal wrong.”

To the same effect see *Ohio & M. Ry. Co. v. McCarthy*, 96 U.S. 258, and *Dillon v. Myers* (Colo.), 146 P. 268, 272.

Appellant has completely failed to challenge the findings of the trial court in the question of ratification (R. 46), despite the fact that these findings sustain the decision of the trial court in this case independently from any question of actual or apparent authority.

D. Appellant Rudeen Is Not in a Position to and Is Estopped from Denying the Validity of the Mortgage.

Another independent basis supporting the decision of the trial court completely unchallenged by appellant's brief is that appellant Rudeen, both because he claimed to purchase as an individual and also because of his representations and the general understanding that his purchase at the tax sale would be *subject to the mortgage*, is not in a position to and is estopped from challenging the validity of the mortgage.

As stated in *Fletcher*, supra, sec. 490:

“As a general rule, if a corporation does not raise the objection that an officer or other person assuming to enter into a contract or do any other act on its behalf, and particularly if it has ratified the act, the objection of want of authority cannot be raised by third persons.”

To the same effect see *Norment v. First Nat'l Bank* (N.M.), 167 P. 731, 732; *Shawmut Comm. Paper Co. v. Overbach* (Mass.), 101 N.E. 1000; and *Boteler v. Conway* (Cal.), 56 P. (2d) 587, 589. The Idaho law is to the same effect. See *Page v. Savage*, 246 P. 304, 8.

It is claimed by Rudeen that he did not purchase the mill on behalf of the corporation or its stockholders, but solely as an individual with his own funds (R. 136-8). This being the case, then since the corporation has never made any attempt to cancel or rescind the mortgage and has never advised plaintiffs that it considers the mortgage to be invalid for lack of authority, then under the cases and authorities cited above, Rudeen, as a third party is not in a position to question the validity of the mortgage.

Not only did Rudeen admit that he failed to inform plaintiffs of his alleged position that the mortgage was invalid until *after* the tax sale, but he engaged in affirmative conduct on which plaintiffs relied and should thus be considered as estopped by his own conduct from questioning the validity of the mortgage.

More specifically, Rudeen wrote a letter dated January 6, 1949 (Ex. 29), and addressed it to plaintiffs, among others. In that letter he stated that the "mill and mill site are covered by a mortgage in the original sum of approximately \$10,000"; that "the personal property of the corporation will be offered for sale by the Department *subject to the \$10,000 mortgage* hereinabove referred to," and that "there is no money in

the treasury of the corporation from which payment of any of the above-described debts can be paid. . . .”(Id.)

Before receiving this letter plaintiffs were concerned that the tax lien might be considered as a prior lien to the mortgage and that the tax sale might thus wipe out their mortgage lien (R. 82). They had thus begun to make arrangements at the bank looking toward the possibility of bidding in the property at the tax sale to protect their mortgage. (Id.) On the receipt of this letter, however, plaintiffs were clearly entitled from the above quoted language to assume that the corporation and Rudeen conceded that the mortgage was a valid prior lien and that the tax sale would be subject to the mortgage. Thus, quite naturally, plaintiffs had a right to and did rely upon this representation by abandoning negotiations with the bank and failing to bid at the tax sale (R. 82 and 100). And if Rudeen is permitted now to claim that the mortgage was not a valid lien upon the property plaintiffs will be seriously prejudiced by their reliance and by giving up their right to protect their interests by bidding upon the property.

In this way Rudeen was enabled to bid in for \$7500. a sawmill and site costing over \$200,000 and admits that he didn't tell plaintiffs his position that the mortgage was invalid until *after* the tax sale (R. 142). Since, as above stated, there was a representation by Rudeen that this purchase would be subject to the mortgage and since plaintiffs were entitled to and did rely to their prejudice, Rudeen should now be estopped from questioning the validity of the mortgage.

In addition, it was understood and agreed by all concerned at the time of the tax sale that the property was to be sold and purchased subject to the mortgage. Thus both plaintiff and his attorney, Mr. Balentine, testified that it was announced at the tax sale that the sale was to be subject to the mortgage (R. 85, 101). In this they were confirmed by the testimony of a Mr. Hale, and a Mr. Long, former timber buyers for the corporation (R. 113-4; 117). Appellant Rudeen testified only that he didn't know if such an announcement was made (Ex. 20, p. 24). In addition it must be remembered that Rudeen had written a letter on January 6, 1949, which recognized the validity of the mortgage and that the sale was to be subject to the mortgage and that he wrote a further letter after the sale stating that he had bought the mill subject to the mortgage (Ex. 29). Thus, the total effect of Rudeen's statements must be taken as an admission of his understanding at the time of the tax sale that the mortgage was valid (at least as to the real property and fixtures) and that the sale was subject to the mortgage at least to that extent.

Therefore, by bidding upon the property "subject to the mortgage" it must be considered that Rudeen agreed to the condition, with the result that it was understood and agreed by all parties concerned—government, mortgagee and purchaser—that the sale was subject to the mortgage.

In view of this understanding and agreement it is submitted that Rudeen is bound thereby and may not now renounce its terms and take the position that the mortgage was not valid and that the sale was not sub-

ject to the mortgage. And since the substance of the foregoing facts are incorporated in findings of fact by the trial court (R. 47-8) which have not been challenged by appellant in its opening brief, it is submitted that they are conclusive against appellant as an independent basis supporting the decision of the trial court and requiring its affirmance on appeal.

II. The court did NOT err in decreeing payment of taxes due to Klamath County.

Appellant next (p. 28) challenges the award by the trial court of \$3,369.32 as taxes due to Klamath County on the mortgaged property. Appellees do not feel called upon to defend this award made to another party except to point out that: (a) The findings of fact state that the parties had stipulated that taxes were due in such amount (R. 50. The written stipulation, R. 64, not being included in the record on appeal); (b) The "Statement of Points" raised no such issue (R. 59, 163); (c) Neither the notice of appeal nor other appellate papers were served upon Klamath County, although it was an original party defendant (R. 57-61).

As to the further contention by appellant (p. 30) that the court failed to determine his rights under his tax deed, it should similarly be sufficient to point out that: (a) This prayer in defendant's answer (R. 17) was not repeated as a contention (R. 37) or made an issue (R. 38-9) in the Pre-Trial Order, except upon the question whether Rudeen's claim of title was subject to or free from the claim of plaintiffs and, by stipulation,

the pleadings were superseded by the Pre-Trial Order (R. 41); (b) That issue was determined by the finding that the tax sale was subject to the mortgage (R. 48) and by the conclusion that the mortgage was valid and superior to the interest secured from the tax sale (R. 51); and (c) The "Statement of Points" is limited to the sufficiency of the evidence to support affirmative findings and does not raise any issues on appeal involving the failure to make necessary findings, conclusions or other determinations (R. 59, 163).

III. The court did NOT err in including in its Findings and Decree a particular description of the property covered by the mortgage.

Appellant contends (p. 30) that since the mortgage contained only a general description of the property covered and since, as contended by appellant, there is no evidence to support the particular description in the decree, it was error to include such a particular description. The fallacy of this argument is that there was ample evidence in the record to support such a particular description.

It is important to note that appellant raises no issue of law on appeal in support of this contention and thus is not in a position to deny the rule that a mortgage on a manufacturing establishment by a general name or by terms generally understood to include all its essential parts passes all machinery belonging thereto, whether annexed to the freehold or not (36 C.J.S., Fixtures, sec. 46; *First State Bank v. Oliver*, 101 Or. 42, 51; 198 P.

920; *Metropolitan Life Ins. Co. v. Kimball*, 163 Or. 31, 52-3; 94 P. (2d) 1101); and that if this mortgage, by its terms, is not entitled to be given such an effect, it should be reformed to that end in order to carry out the intention of the parties (*Kramer v. Alvord*, 97 Or. 227, 231; 189 P. 990). Thus appellant does not now challenge the correctness of contentions to the foregoing effect made by plaintiffs in the Pre-Trial Order (R. 36) and on appeal makes only the limited contention that there is no evidence to support the particular description included by the court in its findings and decree.

The mortgage (Plaintiffs' Ex. 10) describes the property covered by its terms as follows:

“NE¹/₄ of SE¹/₄ Section 13, Township 23, South Range 9 East Willamette Meridian, and a *complete sawmill installed thereon* with buildings consisting *among other things*, as follows:

2 circular saw headrakes

Edger

Automatic trim saw

Conveyors

Conveyor chains

Numerous gas engines and other equipment in connection therewith.

together with tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining.” (Emphasis supplied. See also R. 16.)

Plaintiff Valentine testified that, according to his understanding at the time of his agreement with Camozzi and before the mortgage was executed, it was to cover “one complete sawmill and the land” (R. 72) and

that he did not then know all of the items of personal property at the sawmill, which was located 100 miles from the scene of the negotiations. (Id.)

Plaintiffs' attorney, Mr. Balentine, testified that in the instructions from Camozzi for the drafting of the mortgage he was told that Camozzi had no way of giving him an itemized description of the various pieces of personal property (R. 93-4) and only attempted to describe some of the larger items (which were specified in the mortgage), together with "the further specification of the complete sawmill equipment as it there existed," including also "numerous other gas engines and other equipment there" (R. 94-5).

It is thus of extreme importance to note that the following is included in the Pre-Trial Order as an Admitted Fact:

"20. That on January 27, 1949 and since prior to August 4, 1948 Defendant, Great West Lumber Corporation was the owner of record of the following described real property in Klamath County, Oregon:

The NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 13, Township 23 S., Range 9 East of the W.M.;

that on January 27, 1949, there was on the above described real property a complete sawmill, together with the items set forth in the notice of levy referred to herein or Defendant, Carl Rudeen's Pre-Trial Ex. 25. That the same personal property described above was also on the above described premises on August 4, 1948, and owned by said defendant on said date, except that one of the above described motors was acquired since that date and has since been released to the seller thereof." (R. 28-9)

A comparison of the items included in the Notice of Levy, Ex. 25, with the items included in the Findings and Decree (R. 48-50, 55-7) will reveal that all of the items in the Findings and Decree are also to be found in Ex. 25. Thus, contrary to appellant's claim, there is ample evidence in the record to support the description as given in the Decree.

Further supporting evidence, if any is needed, is to be found in the testimony of a company employee, Charles Scott, who identified all or nearly all of the items included in the final Findings and Decree as integral parts of the sawmill and also testified that all motors (of which there were several) were as a general rule, bolted to the concrete foundations (R. 153-160). It is thus submitted that more than sufficient evidence was submitted to support the determination of the trial court that the "complete sawmill" and the "numerous gas engines and other equipment in connection therewith" included all of the various items set forth in the Findings and Decree.

IV. The court did NOT err in holding that the mortgage was superior to the title claimed by defendant Rudeen under the tax deed.

Appellant next (pp. 21-2) contends that the mortgage was wholly void because no corporate seal was attached; that such a mortgage was not entitled to be recorded; that if it had not been recorded Rudeen's tax deed would have been superior to the mortgage and that therefore the court erred in holding the mortgage to be

superior to Rudeen's tax deed. There are at least four answers to these contentions, any one of which alone is sufficient to sustain the determination of the trial court on this question.

A. The Mortgage Was NOT VOID for Lack of the Corporate Seal.

Appellant has cited (p. 24) a number of cases, mostly decided over fifty years ago, in support of the contention that "a deed purported to be the deed of a corporation without seal is void." While certain of these old cases may stand for such a proposition, most of them are to be distinguished, either upon the ground (1) That they depended upon statutes construed to require seals for corporate deeds (*Johns v. Gillian* (Fla.), 184 S. 140; *Garrett v. Belmont Land Co.* (Tenn.), 29 S.W. 726; *Littelle v. Creek Lbr. Co.* (Miss.), 54 S. 841; *Allen v. Brown* (Kan.), 50 P. 505; and, apparently, *Caldwell v. Morganton Mfg. Co.* (N.C.), 28 S.E. 475); (2) That they involved the execution of objections by a corporation to a bankrupt's discharge, a statutory proceeding (*In re Abramovitz*, 253 F. 299, and *In re Glass*, 119 F. 509); or (3) That they held only that such deeds were not entitled to registration or to admission in evidence from which it does not necessarily follow that they are wholly void (*Texas Consol. C. & M. Ass'n v. Dublin C. & M. Co.*, 38 S.W. 404, and *Fontana v. Pacific Can Co.* (Cal.), 61 P. 580).

In approaching this problem the general rules as to the need for seals upon corporate documents, as set

forth in Fletcher, *supra*, sec. 2466, p. 201, should be considered as follows:

“It was at one time the rule that a corporation would not express its will, or enter into a contract except by an instrument under seal executed by a duly authorized agent. . . . The rule itself was at an early date relaxed and then departed from as a general proposition of law.

and, at page 202:

“ . . . it is now firmly established that unless its charter or the governing statute provides otherwise, a corporation may contract without use of its corporate seal in all cases in which natural persons can bind themselves without the use of a seal.”

and, at page 204:

“Although there is some authority to the contrary, the modern and more sensible doctrine is that the seal of a corporation itself performs no further or greater function than to impart *prima facie* verity of the due execution by the corporation of the written obligation.”

and, at page 208:

“Unless, therefore, there is some charter, or statutory provision requiring it, a corporation need not affix its seal to instruments relating to real property or to personal property.”

and at pages 210-211, sec. 2467:

“The above rules as to the use of corporate seals apply to instruments transferring or incumbering real estate.

* * *

“In the absence of statute, and to some extent as a rule of common law, a deed of corporate property should be under corporate seal.”

and, finally, at pages 212-213:

“Where by statute it is required that deeds of conveyance and mortgages be under seal, a deed or mortgage by a corporation must be under seal. . . .

* * *

“A deed insufficient as a conveyance of a corporation’s legal title to real property, because not under seal as required by the law, may nevertheless be good in equity. . . .”

In Oregon it is provided by Sec. 2-804, O.C.L.A., as follows:

“The seal affixed to a writing is primary evidence of a consideration. In other respects there is no difference between sealed and unsealed writings, except as to the time of commencing actions or suits thereon. . . .”

Section 2-807, O.C.L.A., also provides as follows:

“The last three sections shall not be construed to dispense with a seal to a *deed* or other writing where the same is required by any statute of this state.”

There are no statutes in Oregon requiring seals either upon mortgages or upon documents executed on behalf of corporations, thus placing them in the same category as individuals insofar as the necessity of seals upon documents.

It is true that in the old case of *Eagle Woolen Mills v. Monteith*, 2 Or. 277, it was held that the *deed* of a corporation must be sealed with the corporate seal. In another old case, *Brown v. Farmers Supply Co.* (1893), 23 Or. 541; 32 P. 548, it was stated by way of dictum that it is essential to the proper *execution* of a deed

or mortgage by a corporation that it be done . . . under its corporate seal, but the case was actually decided upon the ground that the mortgage in question did not purport to be executed by or on behalf of the corporation, but only by its officers, without even stating that they acted for or on behalf of the corporation. But in the *Brown* case it was recognized that a defectively executed mortgage "will, in a proper case, be enforced in equity as a mortgage. . ." To the same effect, as to unsealed deeds or mortgages, see 16 Am. Jur., Deeds, sec. 100, and 59 C.J.S., Mortgages, sec. 16, p. 52. Thus it is clear that in Oregon, even under the early *Brown* case an unsealed corporate mortgage was not void, as now contended by appellant.

Apparently no more recent cases have passed upon this problem and apparently none have considered the effect of the provisions of secs. 2-804 and 2-807, *supra*. But it has more recently been held in Oregon that in this state, contrary to many other states, a mortgage "does not convey the title nor does it create an interest or estate in the mortgaged property. It merely creates a lien or an encumbrance against the property as security for the payment of a debt. . . ." *Schleef v. Purdy*, 107 Or. 71, 77; 214 P. 137, 140. Thus, it is submitted, that while a deed may be considered as a mortgage under certain circumstances, a mortgage in Oregon cannot properly be considered as a deed. It follows under the terms of secs. 2-804 and 2-807 that a mortgage on real estate need not bear a seal in Oregon, whether that of an individual or corporation. *A fortiori*, a mortgage on

personal property in Oregon need not bear a corporate seal.

Moreover, and since the sealing of such a deed was recognized in the *Brown* case as going merely to "the proper execution" of the instrument, in Oregon, as under the modern rule as stated above by Fletcher, *supra*, at p. 204, the seal of the corporation performs no further or greater function than to impart a *prima facie* verity of the due execution by the corporation of such an instrument and that the absence of a seal merely shifts the burden of proof in this respect. Indeed this seems to be the view of appellant himself in another portion of his brief where (at page 22) he cites cases in support of the proposition that:

"The burden of proof as to the authority to give a mortgage when the same is not under the corporate seal rests upon the party asserting the right."

See also Appellant's Brief, page 24, point 10.

It should not be necessary to repeat the evidence summarized above in order to demonstrate that plaintiffs in this case more than sustained the burden of proving that this mortgage was executed by the president of the corporation, acting under both actual and apparent authority from the corporation and that its execution was further ratified by the corporation.

B. The Recording of a Mortgage not Entitled to Be Recorded, While not Conveying Constructive Notice May Still Operate as Actual Notice and One Who Takes a Subsequent Deed with Actual Knowledge of Such a Mortgage Cannot Complain.

Appellant next (p. 31) contends that the mortgage, being without seal, was not entitled to be recorded and that his tax deed is thus superior to the mortgage. Of course appellees again contend, for reasons just stated, that no seal was necessary upon the mortgage, with the result that the absence of a seal would not prevent it from being entitled to recording.

But without abandoning this contention and assuming (for the purpose of argument alone, while still denying) that the mortgage in this case was not entitled to be recorded, it does not follow, as appellant contends, be recorded, it does not follow, as respondent contends, that his subsequent tax deed is superior to the mortgage.

In this case appellant, as a director of the corporation, admitted having knowledge of the mortgage at least by November, 1948 (R. 29) and by his letter of January 6, 1949 (Ex. 29) showed further knowledge of the mortgage prior to his purchase of the tax deed from the government on January 27, 1949.

“The defendant, having had notice of the plaintiff’s mortgage prior to taking his own, had all the notice the record of such mortgage could afford, and should be bound by such notice. To hold otherwise would make laws intended to prevent fraud the very instruments of fraud. . . . Record-

ing acts are for the purpose of giving notice to those who have none, and thereby prevent wrong, and not for the purpose of giving undue advantage to those who have notice and thus enabling them to perpetrate wrong. The defendant, having notice, was not a mortgagee in good faith."

To the same effect see *Musgrove v. Bouser*, 5 Or. 313, 316, holding that:

"By our statute every deed not recorded, as required by law, is void, as against a subsequent purchaser in good faith and for a valuable consideration, whose conveyance shall be first recorded. It seems to be well settled in this country, 'both in law and equity, that our recording acts only apply in favor of parties who have acted in good faith' and it is therefore generally held that a conveyance, duly recorded, passes no title whatever, when taken with a knowledge of the existence of a prior unrecorded deed."

See also 45 Am. Jur., Records and Recording, sec. 172, that:

"It is an elementary rule in the construction of recording laws that notice of an unrecorded instrument is equivalent to the recording of it, with respect to the person having such notice. . . ."

Luse v. The Isthmus Transit Railway Co., 6 Or. 125, cited by appellant (p. 25) is not to the contrary, but holds only that a president of a corporation, *as such*, has no authority to execute a mortgage.

Therefore, since appellant admits having had notice of the mortgage before he acquired his tax deed, he cannot complain even though the mortgage was not entitled to be recorded, and to hold otherwise would convert the recording laws into "instruments of fraud."

*C. Appellant, as a Director of the Corporation,
Could Not Upon Taking a Tax Deed Claim
That the Tax Lien Destroyed the Mortgage.*

There is a further and independent reason why Ru-
deen, who was a director of the corporation, could not
purchase the corporate assets at a tax sale and then
claim, as he does now, that the tax lien destroyed plain-
tiffs' mortgage.

As stated in 51 Am. Jur., p. 919:

"It is a general principle of law that one who
by virtue of an existing legal or contractual rela-
tion with another is under an obligation to such
other person to pay the taxes on lands, but who
omits to pay such taxes, can not be allowed to
strengthen his title to such land by buying in the
tax title when the property is sold as a consequence
of his omission to pay the taxes on it; his purchase
at the sale will merely operate as a payment of the
taxes, and the title will be the same as it was before
the sale, except that the lien for taxes is discharged."

and, at page 920:

"The effect of the principle which precludes one
under obligation to pay taxes from becoming the
purchaser at a sale for delinquency in payment of
taxes cannot be evaded by such person by allowing
the property to be sold to a third person and then
purchasing it from him, by organizing a corporation
and causing the tax deed to be made to it, or by
any other collusive arrangement which would di-
rectly or indirectly defeat the operation of the rule."

Moreover, as stated in 13 Am. Jur., p. 960:

"There are many cases supporting, either direct-
ly by the holding or indirectly by the language of

the opinion, the general rule that a director or officer of a corporation has no right to purchase the corporate property at a judicial or other public sale, and that if he does so, the sale is voidable. . . . In order to have the sale disaffirmed, actual fraud or prejudice to the complainant need not be shown."

and, at page 962:

"Furthermore, in those jurisdictions where the purchase of a corporate property at a judicial or other public sale by an officer or director of the corporation is upheld, provided the transaction is accomplished with good faith and full disclosure of the facts, the burden of establishing the bona fides of the transaction is upon the purchaser. The validity of the sale is affected by the adequacy or inadequacy of consideration, and a purchase at a grossly inadequate price is very strong, if not almost conclusive, evidence of fraud or bad faith."

See also 76 A.L.R. 439 (Anno.), and *Enyart v. Merrick*, 148 Or. 321, 331; 34 P. (2d) 629.

The facts of this case clearly show that Rudeen, at the time of his purchase at the tax sale of January 27, 1949, was a director of the corporation; that both previously and after the sale he had attempted to consummate arrangements under which the purchase could be made on behalf of either the corporation, its stockholders, or a reorganized corporation of the same stockholders and that at the time of the purchase it was his intention to purchase the mill for such a purpose. (See minutes of meetings, Ptf. Ex. 1; letters by Rudeen, Ptf. Ex. 29; see also deposition of Rudeen, Ptf. Ex. 20, pp. 15-22, 29-31; testimony of Rudeen, R. 124-8, 136-7.) Thus it is clear that at the time of his purchase Rudeen

intended to purchase the mill for the benefit of the stockholders. This being his intent at that time, his professed subsequent change of intent is both immaterial and so incongruous as to be unworthy of belief. Thus the rule as stated above from 51 Am. Jur. applies and the purchase must be deemed to operate merely as a payment of the taxes, but still subject to all other liens.

On the other hand, if Rudeen is to be believed in his contention that he purchased as an individual, then since he was at that time a director and paid only \$7500 for a sawmill costing over \$200,000 (Exs. 2 and 3), it must be held that the rule as stated above from 13 Am. Jur. applies and that the purchase at such an inadequate consideration is invalid; that Rudeen has not established the burden of proving that the sale was in good faith, and that the sale should be set aside for the protection of creditors whose claims would otherwise be completely wiped out, all to the unjust enrichment of a director of the corporation.

Therefore, it is submitted that defendant's contention that his purchase at the tax sale gives him good title cannot be sustained.

D. The Representations and Agreement That the Tax Sale Would Be SUBJECT to the Mortgage Is an Independent and Conclusive Answer to the Contention That the Tax Title Is Superior to the Mortgage.

The final and conclusive answer to appellant's contention that his tax deed is superior to plaintiffs' mort-

gage is that for the reasons and upon the evidence set forth above (pp. 28-32), it was represented by appellant prior to the tax sale that that sale would be subject to the mortgage and it was further announced and agreed at the time of the tax sale that it would be subject to the mortgage. The trial court made express findings of fact to this effect (R. 48) and the sufficiency of the evidence to support such findings has nowhere been challenged by appellant in his brief. Thus appellant cannot now contend that his tax title is superior to plaintiffs' mortgage.

V. Rule that statements of agent not admissible against principal to prove extent of his authority not applicable where, as here, the point is not properly raised on appeal; a third party, rather than principal, is involved and authority was proved by other evidence.

Appellant's final contention (p. 32) is that the court erred in admitting Camozzi's own declarations as evidence of his authority to execute the mortgage. The answer to this contention is three-fold:

(a) This appeal was limited by appellant's Statement of Points to the sufficiency of the evidence (R. 59, 163) and, further, no proper specification of error was set forth in appellant's brief to raise any question concerning the admissibility of such evidence, as required by Rule 20(1)(d) of this Court.

(b) The rule relied upon by appellant (pp. 23, 32) is that statements upon the authority of the Restate-

ment of Law of Agency, sec. 285, of the agent concerning the extent of his authority are not admissible "against the principal." Here the principal, Great West Lumber Corp., was in default and did not appear. The only defense was by appellant Rudeen who, not being the principal, but posing as a third-party purchaser at the tax sale, cannot seek the shelter of this rule.

(c) The rule, as stated by appellant (p. 23), is subject to further exception where "it appears by *other evidence* that the making of such statement was within the agent's authority or as to persons dealing with agent with *apparent authority* or other power of the agent." In this case there was ample "other evidence," as set forth above (pp. 16-17, 22-3) that Camozzi had both implied actual and also apparent authority to execute the mortgage and, as thereby demonstrated, it is not the fact, as appellant again contends (p. 32), that the "only evidence" of Camozzi's authority was "his own declarations and statements."

For the reasons and upon the authorities set forth in the foregoing brief it is respectfully submitted that the judgment and decree of the trial court are amply supported by the evidence on any one of several independent grounds and should therefore be affirmed.

Respectfully submitted,

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No. 12,912

IN THE

United States Court of Appeals
For the Ninth Circuit

JOSEPH PETER ODDO,

Appellant,

vs.

E. B. SWOPE, Warden, United States
Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

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No. 12,912

IN THE
United States Court of Appeals
For the Ninth Circuit

JOSEPH PETER ODDO,

Appellant,

vs.

E. B. SWOPE, Warden, United States
Penitentiary, Alcatraz, California,
Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called the "Court below", denying appellant's petition for a writ of habeas corpus. (Tr. 19.) The Court below had jurisdiction over the habeas corpus proceedings under

Title 28, *U.S.C.A.* Sections 2241, 2243 and 2255. Jurisdiction to review the order of the Court below denying the petition is conferred upon this Honorable Court by

Title 28 *U.S.C.A.* Section 2253.

STATEMENT OF THE CASE.

The appellant, an inmate of the United States Penitentiary at Alcatraz, California, filed a petition for writ of habeas corpus and thereafter, represented by court-appointed counsel, an amended petition for writ of habeas corpus (Tr. 1-8), and the Court below issued an order to show cause. (Tr. 9.) Thereafter the appellee filed a return to order to show cause (Tr. 10-13), which the appellant traversed. (Tr. 14-18.) The matter was then submitted and the Court thereupon entered the following order denying petition for writ of habeas corpus:

“The Petition for Writ of Habeas Corpus was prematurely filed, since with good-time credits forfeited the said petitioner has not served the valid sentence heretofore imposed against him, and the Courts cannot inquire into whether or not the prison officials have properly or improperly forfeited good-time credits.

Accordingly, on the ground that the Petition is prematurely filed, the said Petition is hereby ordered dismissed and the Order to Show Cause heretofore issued herein is ordered discharged.

Dated: March 20th, 1951.

Michael J: Roche

Chief United States District Judge.”

(Tr. 19.)

From this latter order appellant now appeals to this Honorable Court. (Tr. 29.)

The facts of this case relating to the conviction of the appellant are set forth in the decision of this Honorable Court in

Swope v. Mugavero, 188 F. (2d) 601, rehearing denied May 24, 1951,

involving a codefendant of the appellant. In that case Mugavero contended, as does the appellant in our case at bar, that he was suffering double punishment for the same offense. The Court below did not consider the question of double punishment for the reason that as a result of good-time credits forfeited petitioner had not completed service of the concededly valid sentence.

ISSUES.

The issues raised herein by appellant, may, in substance, be stated as follows:

- I. Has the appellant suffered double punishment for the same offense?
- II. May a Court properly inquire into the forfeiture of good-time credits by prison officials?

ARGUMENT.

I.

THE APPELLANT HAS NOT SUFFERED DOUBLE PUNISHMENT FOR THE SAME OFFENSE.

In *Swope v. Mugavero*, *supra*, this Honorable Court, in reversing a decision of the District Court, found that Mugavero had not suffered double punishment

for the same offense. Inasmuch as the issue raised by appellant herein was identical with the issue raised by Mugavero, appellee adopts in toto as his argument on this phase of the appeal the decision of this Honorable Court in *Swope v. Mugavero*, supra, the authorities cited therein and the reasoning in support thereof.

II.

A COURT MAY NOT PROPERLY INQUIRE INTO THE FORFEITURE OF GOOD-TIME CREDITS BY PRISON OFFICIALS.

Appellant herein and four others, including Mugavero, were convicted in the Southern District of New York on March 9, 1944 on an indictment in nine counts involving two trailer trucks numbered 3 and 4, and their contents, eight of which counts charged violations of Title 18 U.S.C.A., Section 409 (now Sections 659 and 2117), and the ninth, a violation of the Conspiracy Statute, Title 18 U.S.C.A., Section 88 (now Section 371). Each of the first eight counts charged that the defendants "unlawfully, wilfully and knowingly did steal, take and carry away from certain trailer trucks of the Rapid Motor Lines, Inc." goods belonging to various shippers or consignees and forming part of an interstate shipment of freight. Appellant was sentenced on March 16, 1944 to an aggregate term of 15 years; 10 years on Counts one and two, ordered to run concurrently; 5 years on Counts three to eight, inclusive, ordered to run concurrently, but consecutively to the sentences on Counts

one and two; and 1 year and 1 day on Count nine, ordered to run concurrently with the sentence imposed on Counts three to eight, inclusive. The appellant contends that only ten years of the aggregate term imposed is valid and that had not his good-time credits been improperly forfeited he would have been entitled to his release some months prior to the filing of his petition for writ of habeas corpus. Originally a total of 732 days were forfeited by the prison authorities at the United States Penitentiary at Atlanta, Georgia, where the appellant was first confined, and at the United States Penitentiary at Alcatraz, California, where the appellant is presently confined; thereafter, 400 days were restored to the appellant, leaving a balance of 332 days remaining forfeited. As a result of such forfeiture, the ten-year sentence does not expire until on or about September 10, 1951. Appellee argued, and the Court below held, that since the Courts do not inquire into the question of whether a prisoner's good-time credits are properly or improperly forfeited, he has not served his ten-year sentence and, accordingly, even if the remainder of the sentence was invalid, he was not then and there entitled to his release by habeas corpus. In support of this argument appellee cited the following cases:

Sarshik v. Sanford (Warden), 53 Fed. Supp. 425, 142 F. (2d) 676 (C.C.A. 5) same affirmed;

Platek v. Aderhold (C.C.A. 5), 73 F. (2d) 173, 175;

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certiorari denied 323 U.S. 786;
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Snow v. Roche (Judge), (C.C.A. 9), 143 F.
(2d) 718, certiorari denied 323 U.S. 788;
Pagliaro v. Cox (Warden), 54 Fed. Supp. 6,
143 F. (2d) 900 (C.C.A. 8) same affirmed.

On these cases appellee herein likewise relies, although the question will become moot after September 10, 1951, when, even with good-time credits forfeited, the appellant will have served his ten-year sentence.

CONCLUSION.

In view of the foregoing, it is respectfully urged that the order of the Court below denying the petition for writ of habeas corpus is correct and should be affirmed.

Dated, San Francisco, California,
August 24, 1951.

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No. 12193

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

HERBERT A. HOWARD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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IV.

The court erred in giving certain instructions to the jury to which appellant duly excepted, as follows: (a) The court's instructions reported at page 465, lines 17-22, and page 459, lines 12-19, excepted to at page 486, lines 8-18, of Reporter's Transcript, and (b) The court's instruction reported at page 459, lines 20-26, excepted to at page 485, lines 12-23, Reporter's Transcript..... 49

V.

The court erred in denying defendant's motion to dismiss the indictment and for judgment of acquittal on the following grounds: That the evidence is not sufficient to sustain a conviction on Count 24 of the indictment in that there is a complete lack of evidence in the record of this case to establish: (a) That defendant H. A. Howard or any other person, made a report to the Federal Home Loan Bank Board on or about March 22, 1949, (b) That there is in existence any report of examination of the Broadway Federal Savings and Loan Association of Los Angeles as at the close of business March 8, 1949, (c) Any intent to defraud or deceive the Federal Home Loan Bank Board, (d) That there was any Federal Home Loan Bank Board then in existence, (e) That defendant knew or had any reason to know that the signature of Vashti Peake on the promissory note was false or forged..... 53

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No. 12193

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HERBERT A. HOWARD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

Pleadings and Facts Disclosing Basis of Jurisdiction.

This action was instituted in the United States District Court in and for the Southern District of California, Central Division, entitled United States of America, Plaintiff, v. Herbert A. Howard, Defendant, No. 21187-CD, by way of indictment charging appellant in twenty-four counts, with various crimes against the United States. [Tr. p. 2.] Trial was by jury and appellant was acquitted of all except two counts of the indictment, namely, Counts Nos. 22 and 24.

Count No. 22 charges appellant with violation of U. S. C. Title 12, Sec. 1467, and Count No. 24 charges appellant with violation of U. S. C., Title 18, Sec. 1006.

Judgment and Commitment was signed by Harry C. Westover, United States District Judge, and filed November 17, 1950. [Tr. pp. 95-96.]

Notice of Appeal was filed on behalf of appellant by his attorneys, November 20, 1950 [Tr. p. 97], wherein he appeals to the United States Court of Appeals for the Ninth Circuit, from the above-stated judgment and from the denial of defendant's motion to dismiss the indictment and for judgment of acquittal, or in the alternative, for a new trial.

The statutory basis for jurisdiction of the District Court is U. S. C., Title 18, Sec. 3231, and the statutory basis for the jurisdiction of this Court is U. S. C., Title 28, Secs. 1291 and 1294.

Statement of the Case Relating to Count 22.

On June 30, 1947, appellant, Herbert A. Howard, was president of the Broadway Federal Savings and Loan Association of Los Angeles, California, which was an organization enacted under the laws of the United States and in possession of a charter issued pursuant to the Home Owners' Loan Act of 1933. [Tr. p. 39.]

Count 22 of the Indictment charges appellant with the violation of the United States Code, Title 12, Section 1467 and alleges that "On or about June 30, 1947, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant HERBERT A. HOWARD, being an officer and employee, namely: president of said association, with intent to deceive the Home Owners' Loan Corporation and the Federal Home Loan Bank Board, its auditors and examiners, did make and cause to be made a false entry in a report to the Federal Home Loan Bank Board, namely: the regular monthly report for the month ending June 30, 1947, said

entry being reflected in said report in the left-hand column under the caption "ASSETS AND CURRENT EXPENSE" as follows: "1. First mortgage loans: a. Direct reduction loans," and is in the amount of "\$339,752.48, which said sum is over-stated in the sum of \$8500.00." [Tr. p. 13.]

The report involved, which is the subject of Count 22, was first marked Government's Exhibit 22-X for identification and then admitted into evidence as Government's Exhibit 22-X, over the objection that it was incompetent, irrelevant and immaterial. [Tr. p. 345, line 14, to p. 346, line 4.]

Government's Exhibit 22-X was produced by witness Frank C. Noon who testified that he was the manager of the Los Angeles Branch of the Federal Home Loan Bank of San Francisco and supervisory agent for the Federal Home Loan Bank Board and that he had been connected with the Home Loan Bank for eighteen years. [Tr. p. 210.] He further testified that in his capacity with the Federal Home Loan *Bank* he received reports from various Federal Savings and Loan Associations and among such reports were monthly reports. Mr. Noon then produced a monthly report of the Broadway Federal Savings and Loan Association of Los Angeles, California, for June 30, 1947, which is Government's Exhibit 22-X. Mrs. Mildred P. Wilson, who was the assistant secretary of the Broadway Federal Savings and Loan Association on June 30, 1947, testified that appellant read and approved Government's Exhibit 22-X and then gave it to her to send to the Home Loan *Bank*, and that is where the witness sent the Exhibit. [Tr. p. 278, lines 10 to 16.] This in substance is the testimony and evi-

dence relating to appellant's communication of a report to a federal agency.

The testimony and evidence relating to the falsity of the entry are not stated here, as appellant is making no point with respect to the sufficiency of the evidence to show falsity of an entry in the report.

With respect to appellant's intent in causing the monthly report of June 30, 1947, to be made, showing an overstatement of loans, Mrs. Mildred P. Wilson testified that appellant told her he was going to set up collateral loans on certificates held by certain persons in the Broadway Federal Savings and Loan Association and that after the report had been sent to the Home Loan *Bank*, these loans would be cancelled. [Tr. pp. 283 and 342.]

The substance of the testimony and evidence of the Government on appellant's intent, as stated herein, also raises the question of the sufficiency of the evidence to sustain appellant's conviction.

The insufficiency of the evidence is directed particularly to the issues of (1) The making or transmission of a report to the Federal Home Loan Bank *Board*, and (2) the intent of appellant to deceive the Home Owners' Loan Corporation or the Federal Home Loan Bank Board, its auditors and examiners. The question of the sufficiency of the evidence to sustain a conviction on Count 22 was raised below by appellant's motion for judgment of acquittal made at the conclusion of the Government's case and renewed at the conclusion of the entire case.

Specification of Errors Relied Upon by Appellant
Concerning Count 22.

1. The Court erred in denying appellant's motion for a judgment of acquittal in that the evidence is not sufficient to sustain a conviction on Count 22 of the Indictment because the evidence fails to prove: (a) That Government's Exhibit 22-X was transmitted or made to the Federal Home Loan Bank *Board*; (b) That there was any intent of appellant to deceive the Home Owners' Loan Corporation or the Federal Home Loan Bank *Board*, its auditors and examiners and (c) That there was any Federal Home Loan Bank *Board* in existence on June 30, 1947.

2. The Court erred in admitting evidence during the trial over the objection of appellant in that the Court admitted in evidence Government's Exhibit 22-X after objection had been made that it was immaterial, incompetent and irrelevant. [Tr. p. 345.]

ARGUMENT ON COUNT NO. 22.

I

The Court Erred in Denying Appellant's Motion for a Judgment of Acquittal in That the Evidence Is Not Sufficient to Sustain a Conviction on Count 22 of the Indictment Because the Evidence Fails to Prove: (a) That Government's Exhibit 22-X Was Transmitted or Made to the Federal Home Loan Bank Board; (b) That There Was Any Intent of Appellant to Deceive the Home Owners' Loan Corporation or the Federal Home Loan Bank Board, Its Auditors and Examiners and (c) That There Was Any Federal Home Loan Bank Board in Existence on June 30, 1947.

A. *The Indictment and Instructions.* Count 22 charges the appellant with a violation of Section 1467(c) of Title 12 of the United States Code and it is alleged in Count 22 that appellant "did make and cause to be made a false entry in a report to the Federal Home Loan Bank Board, namely: the regular monthly report for the month ending June 30, 1947." [Tr. pp. 13 and 14.] The Court instructed the jury in accordance with the allegations contained in the Indictment. Specifically, the Court instructed the jury in accordance with the Government's requested instructions that one of the elements of the offense charged in Count 22 was that "defendant did make or cause to be made false entry in a report to the Federal Home Loan Bank Board, namely, a monthly report for the month ending June 30, 1947, which report was false in that direct reduction loans were overstated in the amount of \$8500.00." [Tr. p. 454, lines 16 to 20.] In accordance with the allegations of Count 22 and the Court's instructions, the jury's verdict of guilty consti-

tuted a finding by the jury that the report involved in Count 22 was made to the Federal Home Loan Bank Board. The making and transmission of the monthly report of June 30, 1947, to the Federal Home Loan Bank Board being an essential ingredient of the offense charged in Count 22 of the Indictment, the jury's verdict of guilty can stand only if the evidence is sufficient to support a conclusion beyond a reasonable doubt that the monthly report involved was transmitted to the Federal Home Loan Bank Board.

A second essential ingredient of the offense contained in Count 22 and the Court's instructions thereon is that appellant, in making said report to the Federal Home Loan Bank Board, did so "with intent to deceive the Home Owners' Loan Corporation and the Federal Home Loan Bank Board, its auditors and examiners." [Tr. pp. 13 and 454.]

B. *The evidence relating to Count 22.* The only testimony in the record from any employee of the Broadway Federal Savings and Loan Association relative to the transmission of the monthly report was that of Mildred P. Wilson, the assistant secretary at the date of this report on June 30, 1947. The report which is the subject of Count 22 was first marked Government's Exhibit 22-X for identification and admitted into evidence as Government's Exhibit 22-X. [Rep. Tr. p. 345.] The testimony of Mrs. Mildred Wilson relating to the making and transmission of Government's Exhibit 22-X to any Federal Agency is found in the Transcript of Record, page 278, lines 9 to 16. This testimony is as follows:

"By Mr. Danielson:

Q. Do you remember what you did with that report after it was completed? A. After the report

was completed then it always had to go to Mr. Howard's desk, then, after he read it and approved it, then he gave it to me to send down to the *Home Loan Bank*, and that was what was done." (Emphasis added.)

The only other testimony in the record which pertains to the making and transmission of Government's Exhibit 22-X to any Federal Agency is that of Frank C. Noon, a Government witness. The testimony of Mr. Noon pertaining to these matters is contained in the Transcript of Record beginning on page 240, line 7, and going to page 241, line 22, then again on page 245, lines 5 to 18. This testimony of Frank C. Noon is as follows:

FRANK C. NOON

called as a witness by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

"The Clerk: That is spelled N-o-o-n?

The Witness: That is right.

Direct Examination

By Mr. Danielson:

Q. Where do you live, Mr. Noon? A. 5542 Carlton Way, Los Angeles.

Q. What is your work? A. I am manager of the Los Angeles Branch of the Federal Home Loan Bank of San Francisco and supervisory agent for the Federal Home Loan Bank Board.

Q. How long have you been connected with the Home Loan Bank? A. Eighteen years.

Q. For the sake of clarity, is there any connection between the Home Owners Loan Corporation and the Federal Home Loan Bank Board? A. No, ex-

cept they are under the same supervision in Washington. No other connection.

Q. But it is supervised by the same person? A. By the same board in Washington.

Q. In your present capacity with the Federal Home Loan *Bank*, do you receive reports from various Federal Savings and Loan Associations? (Emphasis added.) A. Yes.

Q. Among them do you receive monthly reports? A. Yes.

Q. And are such reports a part of the official records of your office. A. They are.

Q. Do you have with you a monthly report of the Broadway Federal Savings and Loan Association of Los Angeles, California, for June 30, 1947? A. I do.

Q. Will you present it, please?

(The document referred to was passed to counsel.)

Mr. Rose: May we approach the bench?

The Court: Yes.

Mr. Danielson: May I see it, counsel?

(The document referred to was passed to counsel.)

By Mr. Danielson:

Q. Is that a part of the records that are regularly maintained by your office in the course of its business as an arm of the government?

Mr. Rose: That is objected to as being incompetent, irrelevant and immaterial.

The Court: Overruled.

The Witness: This particular sheet was the one sent to Washington and forwarded to me by the chief supervisor in response to the subpoena.

Mr. Rose: I ask that that answer be stricken as being hearsay evidence and improper.

The Court: The last part of it may go out."

With respect to the issue of appellant's intent, the Government's evidence is again the testimony of Mrs. Mildred P. Wilson. In substance Mrs. Wilson testified that in a conversation with appellant, appellant stated that they would set up these collateral loans to show on the monthly report and that after this report had been sent to the Home Loan Bank the loans would be cancelled. [Tr. pp. 283 and 342.]

C. *The insufficiency of the evidence.* The rule seems to be well-settled that in passing upon a motion for a judgment of acquittal the Court must determine whether upon the evidence a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If the Court concludes that upon the evidence there must be such a doubt in a reasonable mind, the motion for judgment of acquittal must be granted. To state the rule another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion for judgment of acquittal must be granted. (See *Curley v. United States*, 160 F. 2d 29; *United States v. Cole*, 90 Fed. Supp. 147, and *United States v. Maryland and Virginia Milk Producers' Association*, 90 Fed. Supp. 681.)

(1) *The insufficiency of the evidence to establish that appellant made a report to the Federal Home Loan Bank Board.* Appellant submits that there is not a scintilla of evidence that Government's Exhibit 22-X was transmitted to, or filed with, the Federal Home Loan Bank Board, and hence appellant is entitled to an acquittal on Count 22.

The government's evidence merely shows that appellant caused Government's Exhibit 22-X to be sent from the Broadway Federal Savings and Loan Association to the Federal Home Loan *Bank*, which is not a crime under Title 12, Section 1467 of the United States Code, which is the statute forming the basis for Count 22. Mrs. Mildred P. Wilson's testimony, as indicated above, was that appellant gave her Government's Exhibit 22-X "to send down to the Home Loan *Bank* and that was what was done." [Tr. p. 278, lines 12 to 15.] (Emphasis added.)

Mrs. Mildred P. Wilson's testimony was corroborated by that of Mr. Frank C. Noon who produced Government's Exhibit 22-X in his "capacity with the Federal Home Loan *Bank*." (Emphasis added.) Although Mr. Noon testified that he was a "supervisory agent of the Federal Home Loan Bank Board" as well as manager of the Los Angeles Branch of the Federal Home Loan Bank of San Francisco, there is no testimony by Mr. Noon that Government's Exhibit 22-X came from the files of the Federal Home Loan Bank *Board*. Mr. Noon's testimony was very specific. Mr. Noon was asked by the government prosecutor whether in his present capacity with the Federal Home Loan *Bank* he received reports from various Federal Savings and Loan Associations and whether monthly reports were among them and whether such reports were part of the official reports of his office and whether he had with him a report of the Broadway Federal Savings and Loan Association for June 30, 1947. Mr. Noon replied yes to these questions and then produced Government's Exhibit 22-X. [Tr. p. 241.] Upon being asked whether Government's Exhibit 22-X was a part of the records that are regularly maintained by his office in the course of its business as an arm of the government,

Mr. Noon testified that "this particular sheet was the one sent to Washington." The balance of Mr. Noon's answer was stricken by the Court. [Tr. p. 245, lines 5 to 18.]

There is thus no testimony whatever to establish that appellant caused Government's Exhibit 22-X to be sent to, or filed with, the Federal Home Loan Bank *Board*.

As a matter of fact, the testimony of Mr. Noon that "this particular sheet was sent to Washington" establishes nothing. There is no testimony as to who sent the document to Washington, who authorized the sending or to whom the document was sent in Washington. It would be nothing but sheer speculation and guessing concerning who sent Government's Exhibit 22-X to Washington, who authorized the sending or to whom the said Exhibit was sent. Certainly there is nothing in the testimony of Mr. Noon which permits a reasonable mind to fairly conclude beyond a reasonable doubt that appellant caused Government's Exhibit 22-X to be sent to the Federal Home Loan Bank *Board*. To form any such conclusion, the jury would be required to reject entirely the testimony of the Government's witness, Mildred P. Wilson, and decide the question on pure speculation, without any evidence at all.

The Government's evidence establishes only that Government's Exhibit 22-X was transmitted to the Federal Home Loan *Bank* by Mrs. Mildred P. Wilson at appellant's direction. But this does not establish a crime under Section 1467 of Title 12 of the United States Code under which Count 22 of the Indictment is brought. Section 1467 of Title 12 of the United States Code creates the crime of false entry only if the report contain-

ing a false entry is made to the Federal Home Loan Bank *Board*. The section uses the term “board,” but “board” is defined in Section 1462(a) of Title 12 of the United States Code as meaning the Federal Home Loan Bank *Board*. Section 1467(c) of Title 12 of the United States Code, which is the basis of Count 22, does not name the Federal Home Loan *Bank* at all as one of the agencies to whom a false report will constitute a crime.

That the Federal Home Loan *Bank* to which the Government’s evidence shows appellant caused Government’s Exhibit 22-X to be sent, is an entirely separate and distinct agency from the Federal Home Loan Bank *Board*, to which Count 22 charges appellant sent Government’s Exhibit 22-X, is too clear for argument.

Both the Federal Home Loan Bank *Board* and the Federal Home Loan *Banks* were created by the Federal Home Loan Banks Act of 1932, enacted as Title 12, Chapter 11 of the United States Code. The Federal Home Loan Bank *Board* was composed of five (5) citizens appointed by the President of the United States by and with the advice and consent of the Senate. (See Sections 1422 and 1437 of Title 12 of the United States Code.)

On the other hand, the United States is divided into between 8 and 12 districts and a Federal Home Loan *Bank* is established in each district. The management of each Federal Home Loan *Bank* is vested in a board of 12 directors, some of whom are appointed by the Federal Home Loan Bank *Board* and the others are elected by the Savings and Loan Associations which are members of the Federal Home Loan *Bank* in their district. (See Sections 1422, 1423 and 1427 of Title 12 of the United States Code for the pertinent provisions.)

There is thus one Federal Home Loan Bank *Board* but there are between 8 and 12 Federal Home Loan *Banks*. From Mr. Noon's testimony, it appears that the bank for this area is the Federal Home Loan Bank of San Francisco with a Los Angeles Branch. [Tr. p. 240.] Making a report to a Federal Home Loan *Bank* is thus making a report to an entirely different government agency than making a report to the Federal Home Loan Bank *Board*.

Congress has clearly and unequivocally made a distinction between the *Board* and a Home Loan *Bank* in fixing criminal responsibility for filing false reports. Thus, in Section 1441(c) of Title 12 of the United States Code (The Federal Home Loan Bank Act of 1932) it is made a crime for anyone connected in any capacity with the Board or a Federal Home Loan Bank to make a false entry in a report "to the (Federal Home Loan Bank) board or a Federal Home Loan Bank." When congress enacted the Home Owners Loan Act of 1933, a year later, it created the crime of false entry in a report to the Federal Home Loan Bank *Board* in Section 1467(c) of Title 12 of the United States Code, which is involved here, but omitted any reference to a report to a Federal Home Loan *Bank*. By including a Federal Home Loan *Bank* in Section 1441(c) of Title 12 of the United States Code along with the Federal Home Loan Bank *Board* but not including a Federal Home Loan *Bank* along with the Federal Home Loan Bank *Board* in Section 1467(c) of Title 12 of the United States Code, which latter section is involved here, Congress indicated a clear legislative intent in the latter statute to confine the crime of false entry to reports in the Federal Home Loan Bank *Board*.

The foregoing clearly and unequivocally establishes that the evidence fails utterly to prove that Government's Exhibit 22-X was filed with the Federal Home Loan Bank Board and hence an essential element of the crime under Count 22 is unproved. Proof that the Government's Exhibit 22-X was filed with a Federal Home Loan *Bank* establishes no crime under Section 1467(c) of Title 12 of the United States Code. An essential element of the crime charged in Count 22 being lacking in proof, there is no evidence in this record upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt and appellant is thus entitled to have his motion for judgment of acquittal on Count 22 granted.

The government's proof would have been insufficient to sustain a conviction under Count 22 even if Mr. Noon's testimony had been that he was producing Government's Exhibit 22-X from the files of the Federal Home Loan Bank *Board*. This would be true because one essential element of the crime is that *appellant must make the report to the Federal Home Loan Bank Board*. The mere drawing up or assembling of a report which contains a false entry does not establish a crime under Section 1467(c) of Title 12 of the United States Code. It is only *communication* of the false statement by the defendant to the agency named in the statute which constitutes a crime. In the case at bar the government's proof, through the testimony of Mrs. Mildred P. Wilson, establishes only that appellant communicated the false statement contained in Government's Exhibit 22-X to *one agency only*, namely, the Federal Home Loan *Bank*. If that agency decided to send the report to another agency, namely, the Federal Home Loan Bank Board, there would still be lacking proof to establish that appel-

lant caused the report to be forwarded to the second agency.

That communication of the false statement by a defendant to the agency named in the statute constitutes the essence of the crime of false entry is established by *Reas v. United States*, 99 F. 2d 752 (C. C. A. 4th). The *Reas* case was a prosecution under Section 1441(a) of Title 12 of the United States Code. The Court stated the rule of law in this convincing fashion:

“ . . . Communication of the false statement to the Corporation constitutes the very essence of the crime. It is in this sense that the statute condemns the making of a false statement for the purpose of influencing the bank. The mere assembling of the material and its arrangement in a written composition containing the misrepresentation of facts can have no effect, and it is only when they are communicated to the lending bank that the crime takes place. . . .” (*Reas v. United States*, 99 F. 2d 752, 755 (C. C. A. 4th).)

- (2) The Evidence Is Insufficient to Establish Any Intent to Deceive the Home Owners' Loan Corporation or the Federal Home Loan Bank Board, Its Auditors and Examiners.

Count 22 is derived from Section 1467(c) of Title 12 of the United States Code, and the instructions given by the Court required a finding by the jury that appellant made a false report to the Federal Home Loan Bank Board with intent to deceive the Home Owners' Loan

Corporation and the Federal Home Loan Bank Board, its auditors and examiners. [See p. 434 of the Transcript of Record for the Instructions.] The record is barren of any testimony that appellant intended to deceive the Home Owners' Loan Corporation. There is no evidence that appellant knew anything about the Home Owners' Loan Corporation or expected such corporation to receive Government's Exhibit 22-X or act upon it. This is likewise true with respect to the matter of intent to deceive the Federal Home Loan Bank Board, its auditors and examiners.

The Government's evidence at best establishes no more than that appellant intended to deceive the Federal Home Loan *Bank*. The evidence was specific on this point. Mrs. Mildred P. Wilson, a witness for the government, testified twice in response to questions, that, in her conversations with appellant with respect to setting up the false entry in Government's Exhibit 22-X, appellant told her that the report was for the Home Loan *Bank* and that after the report was made to the Home Loan *Bank*, the loans which were the false entries would be cancelled. [Tr. pp. 283 and 342.] In the face of Mrs. Wilson's testimony there is lacking any evidence to establish that appellant had any intent to deceive the Home Owners' Loan Corporation or the Federal Home Loan Bank *Board*, its auditors and examiners. This essential element of the crime charged in Count 22 being lacking in proof, appellant's motion for judgment of acquittal on Count 22 should have been granted.

- (3) No Crime Under Section 1467(c) of Title 12 of the United States Code, as Alleged in Count 22 of the Indictment, Could Have Been Committed by Appellant on or About June 30, 1947, as the Federal Home Loan Bank Board Was Not in Existence at Such Time.

Reference is made to *Executive Order No. 9070*, effective date February 24, 1942 (*Title 50, United States Code*, App. Sec. 601, First War Powers Act) which states in part as follows:

“1. The following agencies, functions, duties and powers are consolidated into a National Housing Agency and shall be administered as hereinafter provided under the direction and supervision of a National Housing Administrator: . . .

(b) All functions, powers and duties of the Federal Home Loan Bank Board and of its members.”

Section 8 of the same Executive Order reads in part as follows:

“The following personnel are not transferred hereunder: . . .

(2) the members of the Federal Home Loan Bank Board other than the Chairman . . . The offices of the foregoing personnel excepted from transfer by this paragraph are hereby vacated for the duration of this order: Provided, That the offices of the members of the Federal Home Loan Bank Board shall not be vacated until sixty days from the date of this order.”

The appellant is charged in Count No. 22 of the Indictment with having committed the crime of false entry by making and causing to be made a false entry in a report to the Federal Home Loan Bank Board *on or about June 30, 1947*. It is respectfully submitted that in view of the above Executive Order, no Federal Home Loan Bank Board was then in existence, and for that reason, no crime could be committed in a report to a defunct agency.

On July 27, 1947, practically a month after the alleged crime was committed by the appellant, reorganization Plan No. 3 of 1947 became effective (Title 5 of the United States Code, Sec. 133Y-16) which set up a housing and home financing agency. As part of said agency, Section 1 provides as follows:

“There shall be in said Agency constituent agencies which shall be known as the *Home Loan Bank Board*, the Federal Housing Administration, and the Public Housing Administration.” (Emphasis supplied.)

Section 2 of the same Plan states as follows:

“Sec. 2. Home Loan Bank Board. (a) The Home Loan Bank Board shall consist of three members appointed by the President by and with the advice and consent of the Senate”

Section 2 of the reorganization Plan No. 3 of 1947 hereinabove cited then continues to state further the exact functions of the new “Home Loan Bank Board” which as far as organization is concerned, as well as far as powers and duties are concerned, are entirely different and distinct from the *Federal* Home Loan Bank Board in existence prior to 1942.

It is, therefore, respectfully submitted that on the date of the alleged offense in Count No. 22 of the Indictment, namely, June 30, 1947, no Federal Home Loan Bank Board was then in existence, and the Court's attention is further invited to the fact that the Federal Home Loan Bank Board was never reorganized but a new agency was created in the reorganization Plan No. 3 of 1947, effective July 27, 1947.

II.

The Court Erred in Admitting Evidence During the Trial Over the Objection of Appellant in That the Court Admitted in Evidence Government's Exhibit 22-X After Objection Had Been Made That It Was Immaterial, Incompetent and Irrelevant.

The Government's evidence relating to Government's Exhibit 22-X has been discussed under Point I, *supra*. This evidence established merely that appellant caused the report, identified as Government's Exhibit 22-X, to be sent to the Federal Home Loan Bank. The making of a false report to a Federal Home Loan Bank is not a crime under Section 1467(c) of Title 12 of the United States Code, nor was appellant charged with making such a report to a *Bank* in Count 22.

Government's Exhibit 22-X, therefore, had no relevancy and did not tend to establish appellant's guilt as charged in Count 22, and the trial court erred in admitting the Exhibit in evidence over the appropriate objection of appellant that it was incompetent, irrelevant and immaterial. [Tr. p. 345.]

Statement of the Case Relating to Count No. 24.

On March 22, 1949, appellant Herbert A. Howard was the President of Broadway Federal Savings and Loan Association of Los Angeles, which was an organization acting under the laws of the United States and in possession of a charter issued pursuant to the Home Owners Loan Act of 1933. [Tr. p. 39.] Count No. 24 of the indictment charges appellant with violation of United States Code, Title 18, Section 1006, and particularly, that on March 22, 1949, appellant, as President of the Broadway Federal Savings and Loan Association of Los Angeles,

“with intent to deceive Home Owners Loan Corporation and Federal Home Loan Bank Board, its auditors and examiners, did make and cause to be made, a false entry in a report to the Federal Home Loan Bank Board, namely, an affidavit of the president of said association, attached to the report of examination of said association as at the close of business March 8, 1949, which said affidavit is false in that it alleges that all of the assets recorded on the association’s books are in full force and effect and that the signatures appearing thereon are genuine, whereas in truth and in fact, there was recorded on the records of said association the following notes bearing the signature of one . . . Vashti Peake, Loan No. 274—Vashti Peake, and said signatures were false and forged as the defendant then and there knew.” [Tr. p. 15.]

Frank C. Noon, a government witness, testified that he is the manager of the Los Angeles branch of the Federal Home Loan Bank of San Francisco and supervisory agent for the Federal Home Loan Bank Board and

that he had been connected with the Home Loan Bank for eighteen years. [Tr. p. 240.] He further testified that in his capacity with the Federal Home Loan *Bank* he received reports from various Federal Savings and Loan Associations. [Tr. p. 241.] Mr. Noon further testified as follows:

“Q. Mr. Noon, do you have in your possession report of the Federal Savings and Loan Association’s examiner pertaining to the Broadway Federal Savings and Loan Association dated on or about March 22, 1949? A. I have a certificate of the examiner in charge and the affidavit of the president or secretary on the same sheet.

Q. For the same date, March 22, 1949? A. The affidavit is March 22, 1949.

Q. Will you produce it, please? A. (Producing document referred to.)

Mr. Danielson: I ask that this document be marked Government’s exhibit next in order under Count 24, your Honor.

The Court: It may be received.

The Clerk: 24-B for identification?

The Court: No, it may be received in evidence.

Mr. Jefferson: I object to it, that there is an insufficient foundation laid for it, no relevancy at all has been shown relative to the document now being offered.

The Court: Overruled.

Mr. Rose: And it does not appear that this is a part of the Home Loan Bank Board’s report. It appears to be just one sheet.

The Court: Overruled.

The Clerk: 24-B in evidence, your Honor?

The Court: 24-B in evidence.

(The document referred to was marked Government's Exhibit No. 24-B and received in evidence.)

Mr. Danielson: And is that certificate part of the official records of your office?

The Witness: It is.

Mr. Danielson: No further questions from this witness on direct examination, your Honor." [Tr. p. 254, line 17, to p. 255, line 23.]

Exhibit 24-B is marked as page "17" at the bottom of said exhibit. On cross-examination, Mr. Noon testified:

"Q. By Mr. Rose: You don't know under what circumstances you received that last page over there, of your own knowledge, do you? A. Yes.

Q. Who handed that last page to you? A. I wrote to the Chief Supervisor in Washington in response to a subpoena and asked him to send it to me, and I received it in the mail.

Q. I know. Maybe my question wasn't clear. *You don't know how that last page came into the hands of any government branch, do you?* A. No.

Q. *You don't know under what circumstances that signature of Mr. Howard, if it is Mr. Howard's signature, came to be on that piece of paper?* A. *No, I have no personal knowledge of it.*" [Tr. p. 268, line 26, to p. 269, line 15.]

Appellant testified concerning the same exhibit as follows:

"Q. By Mr. Jefferson: I now direct your attention, Mr. Howard, to Government's Exhibit 24-B, and ask you to examine that document? A. Yes, sir, it is my signature.

Q. Will you state the circumstances under which you put your signature on that document? A. I saw this paper was laying on my desk, and Mr. Manley in going out to lunch—that is the bank examiner—asked me, said ‘Mr. Howard, at your convenient time, I would like for you to sign some papers I place on your desk.’ On the following day, I signed this instrument.

The Court: May I ask a question?

Mr. Jefferson: Yes, your Honor.

The Court: I understand from the testimony that has been produced, and also from the memorandum itself, that that was page 17 of a report. Now, when you say the papers were on your desk, do you mean just that sheet or the entire report?

The Witness: Just this sheet.

The Court: Just this sheet?

The Witness: Yes, and another—there was two other short forms.

The Court: But the other 17 sheets of that report were not with the affidavit?

The Witness: No, your Honor.

Q. By Mr. Jefferson: What was the date that this Mr. Manley was in the Broadway making an examination and handed you this sheet? A. I think it is sometime in March or April.

Q. When you signed this, you say you signed it the next day, what did you do with it after you signed it? A. I left in on my desk that evening.

Q. Do you know who picked the sheet up? A. I don’t know. I couldn’t recall.

Q. When did you next see the sheet again after seeing it on your desk? A. I think today, this is the first time.” [Tr. p. 403, line 10, to p. 404, line 19.]

On April 12, 1948, one Vassar Lee Burks made an application for a loan of \$30,000.00 with the Broadway Federal Savings and Loan Association of Los Angeles, on property located at 625 East 49th Street, Los Angeles, California. [Deft. Ex. MMMM 24.] After the loan was set up on the books of the association, Mrs. Burks cancelled the transaction in escrow and her deposit was refunded to her. At the time of this cancellation, three sisters were working either for the Broadway Federal Savings and Loan Association of Los Angeles, or for Mr. Herbert A. Howard. Vashti Peake, now known as Vashti Cottman, was working in the real estate office of appellant, an office distinct and separate from the association. Alma Moore, the second sister and Mildred P. Wilson, the third sister, were both employed in the office of the Broadway Federal Savings and Loan Association of Los Angeles. After Mrs. Burks had cancelled the escrow and the loan, Mildred P. Wilson and Alma Moore, the two sisters employed by the Broadway Federal Savings and Loan Association of Los Angeles, decided that they would like to take over the property and carry it in the name of their sister Miss Vashti Peake for the reason that both were married and Alma Moore was contemplating a divorce from her husband. [Tr. p. 398, line 26, to p. 399, line 4; p. 401, lines 17-23.]

On August 2, 1948, Vashti Peake signed an application for a loan in the amount of \$22,500.00 payable in installments of \$200.00 per month. [Deft. Ex. E.] Vashti Peake testified that the signature on the application for the loan was her signature. The property was appraised and inspected and the loan approved by appraisers G. W. McKinney, H. C. Hudson, and M. Earle Grant. [Deft. Ex. E.]

Vashti Peake further testified that the signature on a note for \$21,500.00 and a deed of trust securing said note, dated September 1, 1948, were not her signatures. [Govt. Ex. 24-A.]

Vashti Peake further testified that the signature on the original as well as on the duplicate "Notice of Completion" [Deft. Exs. F and G], were her signatures. Her sister Mildred P. Wilson testified concerning the note and trust deed [Deft. Ex. 24-a] that the signatures on said note and trust deed were those of the other sister, Alma P. Moore, and that *Mrs. Wilson notarized the signature on the deed of trust knowing that Alma Moore had signed the third sister's name.* Specifically concerning the acknowledgment of the signature of Vashti Peake on the deed of trust, Mrs. Wilson testified as follows:

"Q. By Mr. Rose: Do you know who signed the name of Vashti Peake above your acknowledgment?

Mr. Danielson: I object to that question on the same ground. It pertains to Count 24. It is beyond the scope of the direct and improper cross.

The Court: Overruled.

The Witness: State your question again, please.

Mr. Rose: Will you read the question?

(The last question was read by the reporter.)

The Witness: Yes, I do.

Q. By Mr. Rose: Who was it? A. Alma P. Moore.

Q. Your sister? A. Yes, my sister.

Q. Vashti Peake is also your sister? A. That is correct.

Q. You notarized the signature, knowing that Alma P. Moore had signed your sister's name? A. That is correct.

Q. And that is your signature? A. Yes, that is my signature.” [Tr. p. 337, lines 6-26.]

Mrs. Wilson testified further concerning this acknowledgment as follows:

“Q. (By Mr. Danielson): What was said, Mrs. Wilson? A. Mr. Howard asked me to notarize this signature.

Q. What did you say, if anything? A. I asked him, how could I notarize it because I knew Vishta didn’t sign that.

Q. What did he say, if anything? A. He said that I take full responsibility for anything that happens at this association.” [Tr. p. 339, line 22, to p. 340, line 2.]

During the month of September or October, 1948, the sisters decided not to go through with the transaction. At that time construction had started on the building and was then in progress. Appellant took over the property including the loan and furnished additional moneys to complete construction of the building. [Tr. p. 406, line 16, to p. 408, line 7.]

He paid the difference between \$33,000.00, the total cost of the building, and the loan of \$21,500.00, out of his own pocket.

On July 5, 1949, Appellant paid off the entire loan, in cash, in the amount of \$20,746.92. [Def’t. Ex. NNNN 24; Tr. p. 408, lines 12-22.] He resold the property to Olivia Daniels, a real estate broker in his office. This sale is evidenced by escrow instructions [Def’t. Ex. J (5)-24] dated September 2, 1949. The purchase by Olivia Daniels of Appellant’s property as evidenced by the escrow instructions, was in part facilitated by way of a \$25,000.00 loan dated August 6, 1949 and evidenced by Government’s

Exhibit 24-C, including a check to Appellant in the amount of \$24,849.50, dated September 12, 1949.

During 1949, Appellant discharged Alma Moore from her position at the Broadway Federal Savings and Loan Association of Los Angeles, on the ground of repeated drunkenness. Shortly thereafter Appellant discharged Mildred P. Wilson as an employee of the Broadway Federal Savings and Loan Association of Los Angeles on the ground of non-cooperation with other employees of the Association. Shortly after the discharge of the two sisters, Vashti Peake resigned from her position in the real estate office of Appellant.

Government's Exhibit 24-B entitled Certificate of Examiner in Charge and Affidavit of President or Secretary, dated March 22, 1949, shows that the signature of Herbert A. Howard as President was purportedly subscribed and sworn to on the 22nd day of March, 1949, before Orville M. Manley, Examiner. Mr. Manley was not called by the government and did not testify. The only evidence of delivery or non-delivery of this document contained in the record of this case, is the testimony of H. A. Howard that said document was not subscribed and sworn to before the examiner nor was it delivered to the examiner nor did he authorize its delivery to any person whomsoever.

Specification of Errors Relied Upon by Appellant Concerning Count No. 24.

1. The indictment fails to allege facts sufficient to constitute an offense against the United States in that Count 24 of the indictment charges the making of a false entry in the report to the Federal Home Loan Bank Board, but such entry is not a Federal crime under Section 1006 of Title 18 of the United States Code, and no Federal Home Loan Bank Board was then in existence.

2. The Court erred in admitting evidence during the trial over the objection by Defendant in that the Court admitted in evidence Government's Exhibit 24-B, the purported affidavit of president H. A. Howard, without any foundation having been laid for its admissibility.

3. The Court erred in failing to give certain requested instructions to the jury and particularly defendant's instruction No. 3 [Tr. p. 66] and defendant's instruction No. 62. [Tr. p. 72, line 22, to p. 73, line 8; excepted to at Tr. p. 489, lines 6-12.]

4. The Court erred in giving certain instructions to the jury to which Appellant duly excepted, as follows: (a) The Court's instructions reported at page 455, lines 17 to 22, and page 459, lines 12 to 19, excepted to at page 486, lines 8 to 18, of Reporter's Transcript, and (b) the Court's instruction reported at page 459, lines 20 to 26, excepted to at page 485, lines 12 to 23, Reporter's Transcript.

5. The Court erred in denying defendant's motion to dismiss the indictment and for judgment of acquittal on the following grounds: that the evidence is not sufficient to sustain a conviction on count 24 of the indictment in that there is a complete lack of evidence in the record in this case to establish: (a) that defendant H. A. Howard, or any other person, made a report to the Federal Home Loan Bank Board on or about March 22, 1949, (b) that there is in existence any report of examination of the Broadway Federal Savings and Loan Association of Los Angeles as at the close of business March 8, 1949, (c) any intent to defraud or deceive the Federal Home Loan Bank Board, (d) that there was any Federal Home Loan Bank Board then in existence: (e) that defendant knew or had any reason to know that the signature of Washii Peake on the promissory note was false or forged.

ARGUMENT ON COUNT NO. 24.

I.

The Indictment Fails to Allege Facts Sufficient to Constitute an Offense Against the United States in That Count 24 of the Indictment Charges the Making of a False Entry in the Report to the Federal Home Loan Bank Board, but Such Entry Is Not a Federal Crime Under Section 1006 of Title 18 of the United States Code, and No Federal Home Loan Bank Board Was Then in Existence.

Section 1006 of Title 18 of the *United States Code* reads in part as follows:

“Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Corporation, Home Owners’ Loan Corporation, Farm Credit Administration, Federal Housing Administration, Federal Farm Mortgage Corporation, Federal Crop Insurance Corporation, Farmers’ Home Corporation, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States, with intent to defraud *any such institution* or any other company, body politic or corporate, or any individual, or to deceive any officer, auditor, examiner or agent of *any such institution* or of department or agency of the United States, makes any false entry in any book, report or statement *of or to any such institution . . .*” is guilty of an offense. (Emphasis added.)

The statute consists of four separate parts and defines:

- (1) the person who may be charged with the crime of false entry;
- (2) the type of false entry which is punishable;
- (3) the persons, individual or corporate, which the wrongdoer may intend to defraud; and
- (4) the persons, individual or corporate, which the wrongdoer may intend to deceive.

In the light of the analysis hereinabove set forth, the statute defines (1) the wrongdoer, and (2) the type of report, as follows:

“Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, Home Owners’ Loan Corporation, Farm Credit Administration, Federal Housing Administration, Federal Farm Mortgage Corporation, Federal Crop Insurance Corporation, Farmers’ Home Corporation, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States. . . . makes any false entry in any book, report or statement of or to *any such institution*,” is guilty of an offense.

The persons which the wrongdoer may intend to defraud or deceive are defined as follows:

“. . . , with intent to defraud *any such institution* or any other company, body politic or corporate, or any individual, or to deceive any officer, auditor, examiner or agent of *any such institution* or of department or agency of the United States,”

The term "any institution" appears three times in his statute. The statute defines the false entry as an entry in any book, report or statement of or to *any such institution*, with intent to defraud *any such institution* . . . or to deceive any officer, auditor, examiner or agent of *any such institution* . . .

The type of person or corporation affected by the wrong-doer's intent to defraud is not limited in this statute to "any such institution," but the scope of the statute is broadened by including the intent to defraud any other company, body politic or corporate, or any individual, and the scope of the statute is further broadened by including in the intent to deceive "any officer, auditor, examiner or agent of department or agency of the United States."

In other words, an officer, agent or employee of institution "A" who makes any false entry on any book, report or statement of or to any *such* institution "A," with intent to defraud "A" or "B" or with intent to deceive any officer, auditor, examiner or agent of "A" or "C," is guilty of an offense.

While the scope of the statute was broadened as far as the intent to deceive or defraud is concerned, by making it a criminal offense to make a false entry in a report with intent to deceive *any* department or agency of the United States, the statute was not broadened as to include entries in reports to agencies other than those specifically enumerated in the first part of the statute.

The most obvious reason for such a conclusion is the fact that the statute recites specifically the institutions, in the first part, to which a report is made. Otherwise,

the specific enumeration of the organizations would be meaningless and the statute would in effect read:

“Whoever, being an officer, agent or employee of or connected in any capacity with any department or agency of the United States makes any false entry in any book, report or statement of or to any department or agency of the United States with intent to defraud any department or agency of the United States or to deceive any officer, auditor, examiner or agent of any department or agency of the United States . . .” is guilty of an offense.

There is no longer any place for the specific enumeration made in Section 1006 of Title 18 of the United States Code under such a construction of the statute. It is, therefore, respectfully submitted that a false entry in a report is a crime under this statute only if the report was made to one of the institutions specifically enumerated, as follows:

- (1) Reconstruction Finance Corporation,
- (2) Federal Deposit Insurance Corporation,
- (3) Home Owners' Loan Corporation,
- (4) Farm Credit Administration,
- (5) Federal Housing Administration,
- (6) Federal Farm Mortgage Corporation,
- (7) Federal Crop Insurance Corporation,
- (8) Farmers' Home Corporation,
- (9) Any Land bank,
- (10) Intermediate Credit bank,
- (11) Bank for cooperatives,
- (12) Any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States.

The Court's attention is invited to *Section 1014 of Title 18, of the United States Code*, which makes it a crime to make any false statement or report for the purposes of influencing in any way the action of . . . a Federal Home Loan Bank, the *Federal Home Loan Bank Board*, the Home Owners' Loan Corporation, a Federal Savings and Loan Association . . .

It is significant that *Section 1467(c) of Title 12 of the United States Code* which was repealed when Section 1006 of Title 18 of the United States Code was enacted, makes any false entry in any book, report or statement of or to the (1) *Board*, or (2) the Home Owners' Loan Corporation, or (3) an association, a crime and fails to further enumerate any other agency or department of the United States, and that the language of this section was carried over into Section 1006 of Title 18 of the United States Code by *omitting* the "Board."

Count 24 of the indictment charges the defendant with a violation of Section 1006 of Title 18 of the United States Code and specifically with making a false entry in a report to the *Federal Home Loan Bank Board*. The Court's instruction stating the elements of the offense charged in Count No. 24 states in part as follows:

"That while so employed, he did make and cause to be made a false entry in a report to the Federal Home Loan Bank Board." [Tr. p. 455, lines 1-3.]

It is respectfully submitted that the instruction as well as the indictment fails to state facts which Section 1006 of Title 18 of the United States Code makes an offense. In that section, it fails to specifically enumerate the "Federal Home Loan Bank Board," as one of the agencies to which such a report may be made.

While a construction and interpretation of a criminal statute is based on two propositions, namely (1) to give effect to the intention of the Legislature, and (2) to give the statute a narrow construction (one of the basic principles of the interpretation of criminal statutes), it is not permissible to *add* to the statute terms which cannot be found therein.

When Section 1006 of Title 18 of the United States Code was re-drafted to replace Section 1467(c) of Title 12 of the United States Code, which was promptly repealed on the date that Section 1006 of Title 18 became effective, the Legislature could have included the Federal Home Loan Bank Board as one of the institutions of or to whom a false entry in a report constituted a crime. The failure of the Legislature to list the Federal Home Loan Bank Board must, according to the rules of construction and interpretation of statutes, be assumed to be an intentional omission, for it is one of the rules of construction and interpretation of statutes that a specific enumeration of terms excludes just as specifically any omitted term.

Count 24 of the indictment charges the making of a false entry in the report to the *Federal Home Loan Bank Board*, in an affidavit by defendant on March 22, 1949. It is respectfully submitted that on said date no Federal Home Loan Bank Board was then in existence.

The Federal Home Loan Bank Board was created under the Federal Home Loan Bank Act and particularly Section 1437 of Title 12 of the United States Code which reads, in part, as follows:

“For the purposes of this chapter, there shall be a Board to be known as the ‘Federal Home Loan Bank

Board' which shall consist of five citizens of the United States appointed by the President of the United States by and with advice and consent of the Senate. . . ."

Executive Order No. 9070, effective date February 24, 1942, as reported in Title 50 of the United States Code, App. Sec. 601, War Powers Act, states in part, as follows:

"1. The following agencies, functions, duties and powers are consolidated into a National Housing Agency and shall be administered as hereinafter provided under the direction and supervision of a National Housing Administrator: . . .

(b) All functions, powers and duties of the Federal Home Loan Bank Board and of its members."

Section 8 of the same Executive Order reads in part as follows:

"The following personnel are not transferred hereunder . . .

(2) the members of the Federal Home Loan Bank Board other than the chairman . . . The offices of the foregoing personnel excepted from transfer by this paragraph are hereby *vacated* for the duration of this order; Provided, That the offices of the members of the Federal Home Loan Bank Board shall not be vacated until sixty days from the date of this order."

Section 1462 of Title 12 of the United States Code was amended by Reorganization Plan No. 3 of 1947, ef-

fective date July 27, 1947, 12 F. R. 4981, 61 Stat. 954. set out at length in Title 5 of U. S. C. A. Sec. 133-y-16, p. 112, as follows:

“Section 1462. Definitions.

(a) The term ‘board’ means the *Home Loan Bank Board*.”

Section 1 of Reorganization Plan No. 3, *supra*, reads in part as follows:

“Section 1. Housing and Home Finance Agencies. The Home Owners’ Loan Corporation, the Federal Savings and Loan Insurance Corporation, the Federal Housing Administration, the United States Housing Authority, the Defense Homes Corporation, and the United States Housing Corporation, together with their respective functions, *the functions of the Federal Home Loan Bank Board* and the other functions transferred by this plan are consolidated, subject to the provisions of sec. (2) and (5) inclusive hereof, into the agency which shall be known as the Housing and Home Finance Agency. There shall be in said agency, constituent agencies which shall be known as the *Home Loan Bank Board*, the Federal Housing Administration, and the Public Housing Administration.

Section 2. *Home Loan Bank Board*.

(a) The *Home Loan Bank Board* shall consist of three persons appointed by the President by and with the advice and consent of the Senate . . .

(c) Except as otherwise provided in subsection (b) of this section, there are transferred to the *Home Loan Bank Board*, the functions (1) of the *Federal Home Loan Bank Board* . . .”

It is therefore, respectfully submitted that Section 1006 of Title 18 of the United States Code not only fails to mention any report of the *Federal* Home Loan Bank Board, but the *Federal* Home Loan Bank Board was finally abolished in 1947 and the Home Loan Bank Board with different functions and a different organization was created.

For the foregoing reasons, a "false entry" in a report to the *Federal* Home Loan Bank Board cannot be a crime, and the indictment fails to state an offense against the United States.

II.

The Court Erred in Admitting Evidence During the Trial Over the Objection by Defendant in That the Court Admitted in Evidence Government's Exhibit 24-B, the Purported Affidavit of President H. A. Howard, Without Any Foundation Having Been Laid for Its Admissibility.

The testimony in connection with the admission in evidence of Government's Exhibit 24-B is reported at page 254, line 17 *et seq.*, of the Transcript as follows:

"Q. Mr. Noon, do you have in your possession report of the Federal Savings and Loan Associations examiner pertaining to the Broadway Federal Savings and Loan Association dated on or about March 22, 1949? A. I have a certificate of the examiner in charge and the affidavit of the president or secretary on the same sheet.

Q. For the same date March 22, 1949? A. The affidavit is March 22, 1949.

Q. Will you produce it, please? A. (Producing document referred to.)

Mr. Danielson: I ask that this document be marked Government's exhibit next in order under Count 24, your Honor.

The Court: It may be received.

The Clerk: 24-B for identification?

The Court: No, it may be received in evidence.

Mr. Jefferson: I object to it, that there is an insufficient foundation laid for it, no relevancy at all has been shown relative to the document now being offered.

The Court: Overruled.

Mr. Rose: And it does not appear that this is a part of the Home Loan Bank Board's report. It appears to be just one sheet.

The Court: Overruled.

The Clerk: 24-B in evidence, your Honor?

The Court: 24-B in evidence.

(The document referred to was marked Government's Exhibit No. 24-B and received in evidence.)"

The foundation questions to admit a business record into evidence are clearly stated by the wording of *Section 1732 of Title 28 of the United States Code*, relating to "Records Made in Regular Course of Business" which reads in part, as follows:

"In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event *if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at*

the time of such act, transaction, occurrence, or event or within a reasonable time thereafter . . .” (Emphasis added.)

It is respectfully submitted that no foundation whatsoever for the admission of this exhibit was laid which would conform to the requirements of Section 1732 of Title 18 of the United States Code.

Apparently the government felt that the foundation was insufficient, because *after* the admission in evidence of this document, the next question by Mr. Danielson is as follows:

“Q. And is that certificate a part of the official records of your office? A. It is.

Q. No further questions from this witness on direct examination, your Honor.” [Tr. p. 255, lines 19 to 23.]

It is respectfully submitted that this attempt to cure the error in the admission of this document, which is the basis for the accusation in Count 24 of the indictment, must of necessity fail, mainly for two reasons: (1) that it is insufficient as a basic foundation question under Section 1732 of Title 18, of the United States Code, because it is assuming that that certificate was a part of the “official records” of a governmental agency and there is absolutely no testimony that it was “the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.” Nor was there any testimony that the record was received by any government agency in the regular course of business, but to

the contrary, there was uncontested and uncontradicted testimony by defendant Howard that it was *not* delivered to any government agency and that he does not know how it came to be attached to any report, nor was it admitted as part of any report to any government agency; (2) The witness was not asked whether by "office" he meant "Federal Home Loan Bank" or "Federal Home Loan Bank Board."

Government's Exhibit 24-B itself does not indicate that the "Certificate of the examiner in charge" or the "Affidavit of president or secretary" is directed to any government agency, nor does Mr. Noon's testimony indicate that it was ever received by any government agency.

It is therefore respectfully submitted that it was prejudicial error to permit this document to be admitted in evidence over the objections of both counsel on the ground that first: an insufficient foundation had been laid for its admission; second: that it had not been shown that this document relates to any of the issues in this action, and third: that it did not appear to be any report or part of any report to the Home Loan Bank Board. The Court charged the jury in the language of the indictment on Count 24 of making a false entry "in a report to the Federal Home Loan Bank Board in that his affidavit, as president of said association, attached to the report of examination of said association, as of the close of business March 8, 1949, alleged that the signatures appearing on all assets recorded on the association's books were genuine, when in truth, there was then recorded on the rec-

ords of the association, a note bearing the signature 'Vashti Peake' which signature was false and forged as defendant well knew." [Tr. p. 451, lines 5-13.]

The questions asked the witness do not have the slightest tendency to identify Government Exhibit 24-B as being the affidavit referred to in the charge of the Court.

There is no mention made elsewhere in Mr. Noon's testimony or in the testimony of any other person, (1) *that there ever was a report of examination of said association as of the close of business March 8, 1949*, to which the affidavit was purportedly attached; (2) that there ever was a report to the Federal Home Loan Bank Board regardless of the date of such report to which any affidavit by this defendant was attached; (3) that any such affidavit was ever at any time delivered to any government branch or agency; and (4) there was no evidence of any act, conduct or statement or any other circumstance from which a jury could have concluded that Herbert A. Howard had an intent to deceive the Home Owners' Loan Corporation or the Federal Home Loan Bank Board at any time. In view of the fact that the charge of violation of Section 1006 of Title 18 of the United States Code as stated must stand or fall with the admission in evidence not of any affidavit of Mr. Howard, but of *the* affidavit referred to in the charge of the Court, reported at Transcript, page 450, line 25, to page 451, line 13, on which the jury presumably based its verdict, it is respectfully submitted that the admission in evidence of Government's Exhibit 24-B over the objections of defendant, is prejudicial error requiring the reversal of conviction on Count 24.

III.

The Court Erred in Failing to Give Certain Requested Instructions to the Jury and Particularly Defendant's Instruction No. 3 [Tr. p. 66] and Defendant's Instruction No. 62 [Tr. p. 72, line 22, to p. 73, line 8, Excepted to at Tr. p. 489, lines 6-12].

Defendant's requested instruction No. 3 reported at Transcript page 66, lines 17 to 20, reads as follows:

"The law admonishes you to view with caution the testimony of any witness which testifies to an oral admission of the defendant or an oral confession by him."

This instruction follows the language of instruction No. 29-D of *California Jury Instructions, Criminal*, prepared under the direction of the Superior Court of Los Angeles County, California, with the cooperation of the Attorney General of California. This instruction was requested by the defendant in view of the fact that the *only* evidence linking this defendant with the signature of Vashti Peake on the Deed of Trust in evidence as Government's Exhibit 24-B, came from Mildred P. Wilson, a former employee of the Broadway Federal Savings and Loan Association and an officer thereof, who had been discharged by the defendant because of her inability to cooperate with the other employees of the association, after her sister Alma P. Moore had been discharged because of continued drunkenness on the job, and her other sister Vashti Peake had resigned from her position with defendant in view of the discharge of her other two sisters, and because there was uncontradicted and uncontested testimony on the part of defendant that the three sisters had agreed to acquire this property, and further

on the ground that the property stood purportedly in the name of Vashti Peake, *one* of the sisters, that the name of Vashti Peake was forged by *another* sister, Alma P. Moore, and acknowledged by Mildred P. Wilson, the *third* sister, as a Notary Public, *knowing that the signature of Vashti Peake was not the signature of her sister*. Defendant felt that the requested cautionary instruction was necessary, and that instruction was requested in lieu of an instruction cautioning the jury not to convict Howard on the uncorroborated testimony of an accomplice, because it did not appear that, under the law, Mildred P. Wilson could be named an "accomplice." Specifically, the testimony of Mildred P. Wilson which, in the opinion of defendant, required the giving of this cautionary instruction, is reported at Transcript, page 339, line 4, *et seq.*, as follows:

"By Mr. Danielson:

Q. Did you ever have any conversation with this defendant Mr. Howard relative to that signature?

A. Yes.

Mr. Rose: That is objected to as being immaterial.

The Court: Overruled.

By Mr. Danielson:

Q. When did you have that conversation? A. When I was given this to be notarized.

Q. Where? A. In the association of the Broadway Federal Savings and Loan.

Q. What was said? A. Well—

Mr. Rose: That is objected to as being immaterial.

The Court: Overruled.

By Mr. Danielson:

Q. What was said, Mrs. Wilson? A. Mr. Howard asked me to notarize this signature.

Q. What did you say, if anything? A. I asked him, how could I notarize it because I knew Vishta didn't sign that.

Q. What did he say, if anything? A. He said that I take full responsibility for anything that happens at this association."

The testimony reported above is the only testimony in this case that Mr. Howard knew that the signature on the *deed of trust* which is part of Government Exhibit 24-A is false and there is no testimony at all in the record that he knew or had any reason to know that the signature of Vashti Peake on the *note* which is part of Government's Exhibit 24-A was false. It is respectfully submitted that in effect the testimony reported above, at best, shows that *the witness* Mildred P. Wilson *knew* that "Vashti didn't sign that." It is respectfully submitted that the answer by Mrs. Wilson: "I asked him how could I notarize it *because I knew Vashti didn't sign that*" is sufficient as a matter of law to interject a reasonable doubt into this case that *defendant* knew that the signature was false.

It is stated in *Gold v. United States* (C. C. A. 3rd), 102 F. 2d 350 at page 351, citing from *Corpus Juris Secundum*:

"Where a timely request is made for instructions which correctly propound the law and which are warranted by the pleadings and the evidence in the

case, it is the duty of the court to give them unless covered by other instructions given, or by the general charge, and non-compliance with this duty will necessitate a reversal where it can be said that appellant was prejudiced.' 5 C. J. S., App. p. 1155, Sec. 1774(a); *Itow v. United States*, 9 Cir., 223 Fed. 25; *Hendry v. United States*, 6 Cir., 223 Fed. 5; *Feeder v. United States*, 2 Cir., 257 Fed. 694, A. L. R. 370; *Caufman v. United States*, 3 Cir., 282 Fed. 776; *Cohen v. United States*, 3 Cir., 282 Fed. 871; *Cooper v. United States*, 8 Cir., 9 Fed. 2d 216; *Sunderland v. United States*, 8 Cir., 19 Fed. 2d 202; *Nanfito v. United States*, 8 Cir., 20 Fed. 2d 376; *Link v. United States*, 10 Cir., 30 Fed. 2d 342; *Little v. United States*, 10 Cir., 73 Fed. 2d 861, 96 A. L. R. 889; *Rosser v. United States*, 75 Fed. 2d 498."

In *People v. Cornett* (1948), 33 Cal. 2d 33, the Court states, at page 39:

"The trial court erred in failing to give an instruction that the jury should have viewed with caution the oral admissions of defendant. Section 2061(4) of the Code of Civil Procedure provides that the jury 'is to be instructed on all proper occasions; that the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution.' It is clear that in view of the foregoing code section the trial court should have given such a cautionary instruction. (*People v. Koenig*, 29 Cal. 2d 87, 94 (173 P. 2d 1); see *People v. Thomas*, 25 Cal. 2d 880, 891 (156 P. 2d 7)."

To the same effect:

People v. Todd, 91 Cal. App. 2d 669.

For the foregoing reasons and in accordance with the above citations, it is respectfully submitted that the failure to give defendant's requested cautionary instruction, was prejudicial error.

Defendant's requested instruction No. 62 [Tr. p. 72, line 22, to p. 73, line 8] reads as follows:

"In connection with Count No. 24 charging the defendant with 'false entry', you are instructed that one of the necessary elements of the crime is the delivery of the affidavit to the Home Loan Bank Board.

If you find that the affidavit was signed by Mr. Howard but was not delivered by him to the Home Loan Bank Board, or if delivered, that such delivery was not authorized by him, you are instructed that the defendant is not guilty of the charge involved in that count and you must acquit him."

Defendant excepted to the refusal to give defendant's Instruction No. 62 as follows:

"Defendant excepts to the refusal to give defendant's instruction No. 62 on the ground that that was the only instruction which stated that delivery of the affidavit to the Home Loan Bank Board was one of the necessary elements of the crime of false entry. Unless there was a report made to the Home Loan Bank Board, there could not be a crime of false entry." [Tr. p. 489, lines 6 to 13.]

One of the chief issues involved in this count was the question of delivery of the purported affidavit in evidence as Government's Exhibit 24-B which the government claims was an affidavit attached to a report of examination of the Boardway Federal Savings and Loan Association of Los Angeles as at the close of business March 8, 1949. The only witness who could have testified to such delivery, namely, Orville M. Manley, who allegedly subscribed and swore to the affidavit, was not called by the government as a witness. There was no evidence at all of delivery, but there was positive, uncontradicted and uncontested testimony by defendant H. A. Howard that this affidavit was not delivered to any government agency by him or by any other person as far as he knew. [Tr. p. 403, line 10, to p. 404, line 19.]

The witness Mr. Noon, who brought Government's Exhibit 24-B into court, stated *that he did not know how that page came to be in the hands of any government agency* [Tr. p. 269, lines 8 to 11], *nor did he know under what circumstances the signature of H. A. Howard came to be on that piece of paper.* [Tr. p. 269, lines 12 to 15.]

It is respectfully submitted that no other instruction was given which covered the question of delivery, and in accordance with the authorities cited in connection with appellant's specifications of error concerning defendant's requested instruction No. 3, failure to give this instruction resulted in prejudicial error to the defendant.

IV.

The Court Erred in Giving Certain Instructions to the Jury to Which Appellant Duly Excepted, as Follows: (a) the Court's Instructions Reported at Transcript, Page 465, Lines 17 to 22, and Page 459, Lines 12 to 19, Excepted to at Page 486, Lines 8 to 18, of Reporter's Transcript, and (b) the Court's Instruction Reported at Page 459, Lines 20 to 26, Excepted to at Page 485, Lines 12 to 23, Reporter's Transcript.

The Court instructed the jury as reported at Transcript, page 465, lines 7 *et seq.* as follows:

“A presumption is an inference which the law requires the jury to make from particular facts, in the absence of convincing evidence to the contrary. A presumption continues in effect *until overcome or outweighed by evidence to the contrary*; but unless so outweighed the jury are bound to find in accordance with the presumption.” (Emphasis added.)

The Court further instructed the jury as stated at page 459, lines 12 *et seq.* of the transcript as follows:

“The law presumes the defendant to be innocent of any crime. This presumption of innocence continues throughout the trial, and has the weight and effect of evidence in favor of the accused. You must consider the evidence in the light of this presumption. The presumption of innocence is sufficient to acquit a defendant, unless the presumption *is outweighed by evidence satisfying the jury beyond a reasonable doubt of the defendant's guilt.*” (Emphasis added.)

The defendant excepted to the first quoted instruction on the ground that:

“It is stated that a presumption continues and is good until overcome or outweighed by evidence to the contrary. It is a general rule, accepted by the federal court, that presumption of innocence is not outweighed by other evidence, but is only outweighed by evidence which gives the jury a conclusion that the evidence outweighs the presumption beyond a reasonable doubt and to a moral certainty. For that reason the defendant objects to that instruction. It is not sufficient to counteract that by any evidence other than of that weight.” [Tr. p. 486, lines 10 to 18.]

It is respectfully submitted that the instruction, reported at page 459, lines 12 *et seq.* as quoted above, correctly states the law, namely, that the presumption of innocence is sufficient to acquit a defendant unless the presumption is outweighed by evidence satisfying the jury beyond reasonable doubt of the defendant's guilt, but it is not overcome or outweighed merely by “evidence to the contrary.”

The jury was confronted with two conflicting instructions, one which obviously is not the law, and the other which correctly states the law. It is respectfully submitted that this conflict resulted in a prejudicial error to the defendant in that the jury might have applied the definition of presumption applicable in *civil cases only*, although the evidence on which they might have acted was not sufficient to outweigh the presumption beyond a reasonable doubt or to a moral certainty.

The Court defines “proof beyond reasonable doubt” in its charge to the jury as follows:

“Proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely and act upon in the most important of your affairs.” [Tr. p. 439, lines 23 to 25.]

The Court charged the jury further on the question of reasonable doubt as follows:

“Reasonable doubt exists in any case when, after careful and impartial consideration of all the evidence, the jurors do not feel satisfied to a moral certainty, that defendant is guilty as charged.” [Tr. p. 460, lines 10 to 14.]

Defendant excepted to the first quoted instruction, as reported at page 485, line 12 of the transcript, as follows:

“Defendant excepts to Government’s No. 3 entitled ‘Presumption of Innocence, Burden of Proof, Reasonable Doubt.’ It sets up two standards which are irreconcilable, namely, one is that proof of a crime beyond a reasonable doubt is established by evidence which they would be willing to act upon in the most important of their own affairs. On the other hand, it is said that reasonable doubt exists only when they are satisfied to a moral certainty that the defendant is not guilty of the charge. That sets up two standards which are irreconcilable with each other and for that reason defendant excepts.”

It is a well known fact that persons might act in an event "most important to their own affairs" on facts which are doubtful and conjectural and that they are willing to take their chances and risks depending upon the prospective profits and results. Such a statement is far removed from the standards applied in a criminal case, namely, a conviction of the jury to a moral certainty that defendant is guilty of the charge. The feeling of "moral certainty" cannot be compared with any other feeling which might be applied by the juror in his business or other place. The statement needs no explanation and the average person will well be able to understand and evaluate his duty in applying it.

The instruction of the Court, related at page 459, lines 20 to 26, of the transcript, is in irreconcilable conflict with the standards embodied in the instruction at page 460. lines 10 to 13, of the transcript, and for that reason, it is respectfully submitted that the Court committed prejudicial error in giving the first mentioned instruction.

V.

The Court Erred in Denying Defendant's Motion to Dismiss the Indictment and for Judgment of Acquittal on the Following Grounds: That the Evidence Is Not Sufficient to Sustain a Conviction on Count 24 of the Indictment in That There Is a Complete Lack of Evidence in the Record of This Case to Establish: (a) That Defendant H. A. Howard, or Any Other Person, Made a Report to the Federal Home Loan Bank Board on or About March 22, 1949, (b) That There Is in Existence Any Report of Examination of the Broadway Federal Savings and Loan Association of Los Angeles as at the Close of Business March 8, 1949, (c) Any Intent to Defraud or Deceive the Federal Home Loan Bank Board, (d) That There Was Any Federal Home Loan Bank Board Then in Existence, (e) That Defendant Knew or Had Any Reason to Know That the Signature of Vashti Peake on the Promisory Note Was False or Forged.

The testimony of the witness Frank C. Noon has been recited repeatedly for other reasons. Nowhere in the record is there any evidence that defendant Howard or any other person made a report in affidavit form to the Federal Home Loan Bank Board on or about March 22, 1949. The evidence conclusively shows that Government's Exhibit 24-B which purports to be an affidavit sworn and subscribed to by Orville M. Manley, examiner, was never sworn and subscribed to before anyone. The examiner has not been called as a witness by the government, and defendant's testimony stands uncontradicted, uncontested and unimpeached to that effect. The indictment charges that the affidavit in question was attached to a report of examination of the Broadway Federal Savings

and Loan Association of Los Angeles as at the close of business March 8, 1949. There is no evidence whatsoever of any report as of that date and as a matter of fact, that date was never mentioned by any witness in this action. While intent to deceive or defraud may be proved or inferred from acts, circumstances or statements, there was no evidence in this case on which a jury could have found that there was any intent by this defendant to defraud or deceive anyone. It has been set forth at length that the Federal Home Loan Bank Board to whom a report was purportedly made, was abolished by Reorganization Plan No. 3 in 1947, and that no Federal Home Loan Bank Board was in existence on March 22, 1949, to which such report might have been made.

The indictment charges the defendant Howard with making or causing to be made,

“a false entry in a report to the Federal Home Loan Bank Board, namely, an affidavit of the president of said association, attached to a report of examination of said association as at the close of business of March 8, 1949, which said affidavit is false in that it alleges that all of the assets recorded on the association's books are in full force and effect and that the signatures appearing thereon are genuine, whereas in truth and in fact, there were recorded on the records of said association the following *notes* bearing the signature of one Colleen B. Williams and one Vashi Peake:

Loan No. 267—Colleen B. Williams

Loan No. 274—Vashti Peake,

and said signatures were false and forged as the defendant then knew.” [Tr. p. 16, lines 3 to 10.]

The Court charged the jury as follows:

“Count 24 of the indictment charges that on or about March 22, 1949, in Los Angeles County, California, the defendant, Herbert A. Howard, as president of the Broadway Federal Savings and Loan Association of Los Angeles, with intent to deceive the Home Owners’ Loan Corporation and the Federal Home Loan Bank Board, its auditors and examiners, did make and cause to be made a false entry in a report to the Federal Home Loan Bank Board in that his affidavit, as president of said association, attached to the report of examination of said association as of close of business March 8, 1949, alleged that the signatures appearing on all assets recorded on the association’s books were genuine, while in truth there were then recorded on the records of the association a *note* bearing the signature ‘Vashti Peake’ which signature was false and forged as the defendant well knew.” [Tr. p. 450, line 25, to p. 451, line 13.]

It is respectfully submitted that *there is not one word of evidence in the transcript that the defendant knew that the signature on the note referred to in the indictment and in the charge of the court was either false or forged*. The only evidence relates to the *deed of trust* attached to Government’s Exhibit 24-A and does not relate to the *note*. Mildred P. Wilson, one of the three sisters, testified as follows:

“By Mr. Danielson:

Q. What was said, Mrs. Wilson? A. Mr. Howard asked me to notarize the signature.

Q. What did you say, if anything? A. I asked him, how could I notarize it because I knew Vishta didn’t sign that.

Q. What did he say, if anything? A. He said that I take full responsibility for anything that happens at this association." [Tr. p. 339, line 20, to p. 340, line 2.]

All of the testimony relates to the *notarization of the deed of trust and not to the note*. But even the testimony above related is conjectural, ambiguous and immaterial. Mrs. Wilson particularly states:

"I asked him, how could I notarize it *because I knew Vishta didn't sign that.*"

It does not appear whether she knew that Vishta didn't sign that or whether she told Howard that Vishta didn't sign it. Her next answer "He said that I take full responsibility for anything that happens at this association," is immaterial and does not assist one way or the other in determining any issue in this case because apparently Howard did not state that *he* was taking full responsibility but he stated that *she* was taking full responsibility for anything that happened at the association.

In any event all of the above testimony refers to the *deed of trust* and is not an issue in this case. Defendant is not charged in the indictment, nor did the court charge the jury, that defendant knew that the signature on the deed of trust was false or forged, but the indictment charges defendant and the court charged the jury that the signature on the *note* was false and forged as the defendant then knew, and there is not one speck of evidence anywhere in the record of this action indicating such knowledge by this defendant.

Since the jury found defendant guilty of making a false entry in the report to the Federal Home Loan Bank

Board, that defendant knew the entry to be false and forged, and that defendant made such entry with intent to deceive and defraud the Federal Home Loan Bank Board, the jury must have found those facts from the above evidence, because no other evidence was available to them.

The following fact was established by Mr. Noon's testimony, namely: that he received the Government's Exhibit 24-B from a "chief supervisor" in Washington. Noon admitted that he did not know under what circumstances the signature of Mr. Howard was affixed to the affidavit, nor did he know how the report came to be in the hands of a government branch. The evidence, therefore, shows:

Fact: Noon received Government's Exhibit 24-B from a "Chief Supervisor" in Washington.

First Inference to be drawn by Jury: That Noon received the Government's Exhibit 24-B from the Home Loan Bank Board and that it was a part of a report made to the Home Loan Bank Board relating to the business of Broadway Federal Savings and Loan Association of Los Angeles as of the close of business March 8, 1949 and that said report was made by an examiner attached to the Home Loan Bank Board or under its jurisdiction whose name was Orville M. Manley.

Second Inference to be drawn by the Jury: That the "Affidavit of president or secretary" which was signed by Howard was subscribed and sworn to before Orville M. Manley, examiner, on March 22, 1949, and that H. A. Howard handed that affidavit to Orville M. Manley, examiner, for the purpose of having it attached to a report to the Home Loan Bank Board.

Third Inference to be drawn by Jury, based on the First and Second Inferences: That at the time Mr. Howard knew that the signature on a note in evidence as Government's Exhibit 24-A was false and forged, and that he signed the affidavit in evidence as Government's Exhibit 24-B with intent to deceive and defraud the Home Loan Bank Board.

It is settled law that a defendant cannot be convicted if a necessary element to his conviction is supplied by an inference upon an inference upon an inference based upon a fact. Such evidence is mere speculation and would not be permissive even in a civil case as proof of any fact.

Judge Yankwich cited numerous authorities and states in *United States v. Cole*, 90 Fed. Supp. 147, at page 156:

"The Courts, in interpreting criminal statutes which require knowledge as an essential element of criminality, have warned us not to draw an inference on an inference."

It is stated in 20 *Am. Jur.* 168, Section 164:

"An inference may not be based upon another inference or upon a fact, the existence of which, itself, rests upon an inference." Citing *U. S. v. Ross*, 92 U. S. 281, 23 L. Ed. 707, and others.

It is stated in 25 *A. L. R.* 173:

"The rule that an inference cannot be based upon an inference to establish a fact necessary to be proven in the trial of a case has been said to apply to every sort of a case where a definite and ultimate fact must be found as a basis of recovery. In general, no distinction has been made between civil and criminal cases, as regards the rule that an inference cannot be based upon another inference, the rule apparently

being regarded as applicable in both classes of cases. In a criminal case in a Court of Appeals of Ohio, the Court, in reversing the judgment, said that the conviction could only be had from inference based upon inference which was not sufficient in a civil action to sustain a judgment, and much less would it be sufficient to sustain a conviction on a criminal charge, wherein the State must prove the charge beyond a reasonable doubt."

In the instant case, it is not only a question of an inference based upon an inference based upon a fact, but in addition to that the record shows the unimpeached, clear and uncontradicted testimony by Mr. Howard that the affidavit was *not* delivered and *not* made a part of any report to the Federal Home Loan Bank Board negating in addition, any intent to deceive the Federal Home Loan Bank Board. It is the general rule as stated by the United States Supreme Court and in the text books on evidence, that *an inference is dispelled by positive and otherwise uncontradicted testimony to the contrary.*

In Pennsylvania Railroad Co. v. Chamberlain, 288 U. S. 333, 77 L. Ed. 819, the United States Supreme Court affirmed the judgment for a directed verdict in a civil case of the District Court, the Court stating at page 340, citing numerous supporting decisions:

"And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought

to be inferred did not exist. This conclusion results from a consolidation of many decisions, of which the following are examples (citing twelve cases). A rebuttable inference of fact, as said by the court in the Wabash R. Company case, 'must necessarily yield to credible evidence of the actual occurrence.' And, as stated by the Court in *George v. Missouri P. R. Co. supra*, 'It is well settled that where plaintiffs' case is based on an inference or inferences, that the case must fail upon proof of undisputed facts inconsistent with such inference'."

The Supreme Court then continues its argument along the same lines, and it is respectfully submitted that in view of this holding, an inference of the existence of a particular fact from other proven facts is dispelled in the face of positive and otherwise uncontradicted testimony of an unimpeached witness, from which testimony it affirmatively appears that the facts sought to be inferred did not exist.

As in the last cited case, Mr. Howard, in the case at bar, affirmatively testified that the facts inferred did not in fact exist, namely, that he did not attach the affidavit to any report nor did he authorize any person to attach the affidavit to any report, and for that reason, an intent to deceive the Federal Home Loan Bank Board is of necessity negated.

It is stated by *McBaine* in his *Evidence Manual* at page 666, Section 426:

"Although proof of specified facts, standing alone, warrants an inference of an ultimate or operative fact, involved in a law suit, if, however, there is evidence of the non-existence of the latter fact, which

is uncontradicted and not improbable, uncertain or vague, the inference may not be drawn by the triers of the fact, although the evidence is produced by the litigant disputing the ultimate fact asserted.” (Citing *Engstrom v. Auburn Auto Sales Corp.*, 11 Cal. 2d 64, 77 P. 2d 1059.)

Again at page 668 of the last cited text on evidence, McBaine states:

“An inference is dispelled as a matter of law when it is rebutted by clear, positive and uncontradicted evidence which is not open to doubt, even though such evidence is produced by the opposite side.”

It is respectfully submitted that the factual situations referred to by the United States Supreme Court, by McBaine and by numerous cases cited in these cited quotations, coincide with the situation encountered in the case at bar, where the Jury has to draw a minimum of three inferences, one based upon the other to arrive at the conclusion that a necessary element of the offense charged in Count No. 24 of the indictment against Mr. Howard is proven, in the face of the clear and concise evidence to the contrary by the defendant.

If we consider “the fact” on which these inferences might have been based by the Jury, namely, the fact that Mr. Noon testified that he received the affidavit from a Chief Supervisor in Washington, and *that he had no personal knowledge how it got there*, it becomes clear that the foundation on which Government’s Exhibit

24-B was admitted into evidence is as shaky, speculative and unfounded as the inferences themselves.

The answer to this argument on Count 24 of the indictment against Herbert A. Howard hinges on the fact that the Government failed to produce Mr. Manley, the person who purportedly notarized the signature of Mr. Howard on Government's Exhibit 24-B, and who purportedly audited the association's records at the time charged in the indictment, and who purportedly prepared a report to the Federal Home Loan Bank Board to which it is claimed, Government's Exhibit 24-B was attached.

On this point, it is clearly stated in *Wesson v. United States* (C. C. A. 8th, 1949), 172 F. 2d 936:

"The failure of the Government, under the circumstances disclosed, to call these witnesses, justifies, if it does not compel, the inference that their testimony would have been against the government. *Aetna Casualty & Surety Co. v. Reliable Auto Tire Co.*, 8 Cir., 58 F. 2d 100; *Goldie v. Cox*, 8 Cir., 130 F. 2d 695; *Donnelly Garment Co. v. Dubinsky*, 8 Cir., 154 F. 2d 38; *Futrell v. Arkansas-Missouri Power Corporation*, 8 Cir., 104 F. 2d 752.

Defendant's testimony fully explains the only discrepancies that appeared in any of his prescriptions covering the entire time in controversy. The cases cited to support the government's theory here were cases in which the purchase and possession of extraordinary quantities of narcotics were unexplained. Certainly, the proven circumstances were as consistent with innocence as they were with guilt, and in-

ference may not be drawn from inference. As said by us in *Nations v. United States*, 8 Cir., 52 F. 2d 97, 105, in an opinion by Judge Stone: ‘Such double inferences are too remote to constitute evidence. As said by the Supreme Court in *United States v. Ross*, 92 U. S. 281, 283, 23 L. Ed. 707; ‘They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliably drawn from premises which are uncertain.’

The circumstances as they stand out in the record are consistent with the direct, uncontradicted and unimpeached testimony of the defendant and his witness. Mere suspicion raised by the circumstances proved would not sustain a conviction, especially when such suspicion is removed by uncontradicted evidence.

It follows that the judgment must be reversed and the cause remanded to the trial court with directions to enter a judgment of acquittal under Rule 29(a) of the Federal Rules of Criminal Procedure, 18 U. S. C. A., relative to motions for acquittal.” (Emphasis added.)

It is respectfully submitted that based upon the foregoing authorities and the reasons stated therewith, and upon the complete lack of evidence concerning every part or portion of the charge on Count 24 of the indictment, the Court erred in denying Defendant’s motion for judgment of acquittal.

Conclusion.

For the foregoing reasons, and in accordance with the above-cited authorities, it is respectfully submitted that the judgment of conviction should be reversed and the case remanded to the trial court with instructions to dismiss the Indictment as to Count 24 and to enter a judgment of acquittal under Rule 29(a) of the Federal Rules of Criminal Procedure as to both Counts 22 and 24 of the Indictment.

Respectfully submitted,

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12913
No. ~~12193~~

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

HERBERT A. HOWARD,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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FILED
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No. 12193
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

HERBERT A. HOWARD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

Jurisdictional Statement.

Appellant was indicted on March 8, 1950, and was subsequently convicted of two counts of that indictment charging violations as follows: Count 22, a violation of 12 United States Code 1467, and Count 24, charging a violation of 18 United States Code 1006 [R.¹ 13 and 15].

The District Court had jurisdiction of the cause under 18 United States Code 3231. The offenses charged were committed in Los Angeles County, California, within the Central Division of the Southern District of California.²

Judgment was entered on November 17, 1950 [R. 95-96], Notice of Appeal was filed on November 22, 1950 [R. 97, 98]. This Court has jurisdiction of the appeal under Section 1291 of Title 28 of the United States Code.

¹References preceded by the letter "R." are to the typewritten transcript of record; those by an "A. B." to Appellant's Opening Brief.

²The indictment so charged [R. 13 and 15]. The evidence supported it. No attack is made on the grounds of lack of jurisdiction or venue.

Statement of the Case.

On March 8, 1950, the Federal Grand Jury at Los Angeles returned an indictment against the appellant in twenty-four counts, which was filed that day in the United States District Court for the Southern District of California, Central Division [R. 16].

On April 17, 1950, appellant pleaded not guilty to all counts [R. 24]. Trial was commenced before a jury on October 17, 1950 [R. 113]. In the course of the trial the government dismissed four counts. On November 9, 1950, the jury found the appellant not guilty of eighteen of the remaining counts and guilty of Counts 22 and 24 [R. 85]. Appellant's motions to dismiss the indictment and for judgment of acquittal on Counts 22 and 24 of the indictment, or in the alternative for a new trial [R. 87-92], and for arrest of judgment [R. 93] were denied [R. 93]. On November 17, 1950, appellant was sentenced to pay a fine of \$2,500.00 on Count 22 of the indictment and to pay a fine of \$2,500.00 on Count 24 of the indictment [R. 95-96]. Notice of Appeal was filed on November 22, 1950 [R. 97-98].

Counts 22 and 24 of the indictment charge violations of 12 United States Code 1467 and 18 United States Code 1006, respectively as follows:

"COUNT TWENTY-TWO

(U. S. C., Title 12, Sec. 1467)

At the time hereinafter mentioned, the Broadway Federal Savings and Loan Association of Los An-

geles was organized under, and was in possession of a charter issued pursuant to, the Home Owners' Loan Act of 1933;

On or about June 30, 1947, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant HERBERT A. HOWARD, being an officer and employee, namely: president of said association, with intent to deceive the Home Owners' Loan Corporation and the Federal Home Loan Bank Board, its auditors and examiners, did make and cause to be made a false entry in a report to the Federal Home Loan Bank Board, namely: the regular monthly report for the month ending June 30, 1947, said entry being reflected in said report in the left-hand column under the caption 'ASSETS AND CURRENT EXPENSE' as follows: '1. First mortgage loans: a. Direct reduction loans,' and is in the amount of '\$339,752.48,' which said sum is over-stated in the sum of \$8500.00.

COUNT TWENTY-FOUR

(U. S. C., Title 18, Sec. 1006)

At the time hereinafter mentioned, the Broadway Federal Savings and Loan Association of Los Angeles was organized under, and was in possession of a charter issued pursuant to, the Home Owners' Loan Act of 1933;

On or about March 22, 1949, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant HERBERT A. HOWARD, being an officer and employee,

namely: president of said association, with intent to deceive the Home Owners' Loan Corporation and the Federal Home Loan Bank Board, its auditors and examiners, did make and cause to be made a false entry in a report to the Federal Home Loan Bank Board, namely: an affidavit of the president of said association attached to the report of examination of said association as at the close of business March 8, 1949, which said affidavit is false in that it alleges that all of the assets recorded on the association's books are in full force and effect and that the signatures appearing thereon are genuine, whereas in truth and in fact, there were recorded on the records of said association the following notes bearing the signature of one Colleen B. Williams and one Vashti Peake:

‘Loan #287—Colleen B. Williams

‘Loan #274—Vashti Peake,

and said signatures were false and forged as the defendant then knew.”

· It is noted that 18 United States Code 1006 is in part based upon 12 United States Code 1467 and superseded that section as of September 1, 1948. Reviser's Notes, 18 United States Code 1006; Section 20, Act of June 25, 1948, 62 Stat. 862. Thus the two counts charge similar violations except as to the date and the nature of the false entry.

ARGUMENT.

Appellant's brief is divided into attacks on convictions under Count 22 and Count 24, respectively. Appellee's brief will deal with each of appellant's arguments in the order in which they were advanced.

ARGUMENT ON COUNT TWENTY-TWO.

- (1) The Court Properly Denied Appellant's Motion for a Judgment of Acquittal on the Ground That Exhibit 22-X Was Not Transmitted or Made to the Federal Home Loan Bank Board.

Exhibit 22-X is the monthly report to the Board of Directors of the Broadway Federal Savings and Loan Association of Los Angeles, California, for the month ended June 30, 1947. Such reports are required by the regulations governing Federal Savings and Loan Associations, one copy going to the Federal Home Loan Bank and two copies to the Federal Home Loan Bank System in Washington. (24 C. F. R. 143.5 (Appendix, p. 9).)

The evidence shows this report was produced in Court by Frank C. Noon [R. 241], who was "Manager of the Los Angeles Branch of the Federal Home Loan Bank of San Francisco and Supervisory Agent for the Federal Home Loan Bank Board" [R. 240]. Noon testified that in his capacity with the Federal Home Loan Bank he received monthly reports from the Federal Savings & Loan Associations, which reports were a part of the official records of his office and that he had with him the monthly report of the Broadway Federal Savings and Loan Association of Los Angeles, California, for June 30, 1947 [R. 241]. The exhibit was then marked for identification as Government's Exhibit No. 22-X [R.

244]. He further identified the particular sheet as being the one sent to Washington [R. 245].

During cross-examination of Mr. Noon [R. 269] appellant's attorney, Rose, picked up the exhibit and the following interrogation ensued [R. 269-270]:

"Mr. Rose: May I have the other exhibit that Mr. Noon brought in? Oh, it is over here.

Q. Did you receive this in the regular mail at your office? A. Yes, from the Chief Supervisor.

Q. Where is he located? San Francisco? A. Washington.

Q. That is something else that came from Washington, and you don't know anything about it, otherwise? A. Not this paper, no.

Q. I am talking about that paper. A. No.

Q. Is this a copy of the regular monthly report of the board of directors of the Federal Savings and Loan Associations of Los Angeles that, to your knowledge, was made out monthly by some officer of the Association? A. Yes, I don't know. This appears to be the original. The directors may have had copies.

Q. That is the usual form supplied by the Home Loan Bank Board, is that right? A. That's right.

Q. I think it has some notation in the corner. A. Yes.

Q. 'Form FMR, Office of the Government, FHLB, System,' is that right? A. Yes."

During the interrogation which followed [R. 270-273] the witness was questioned concerning the various entries which appeared upon Exhibit 22-X and clearly established that it is the monthly report of the Broadway Federal Savings and Loan Association of Los Angeles

for the month ending June 30, 1947, and one of the reports that is, by regulation, required to be made to the Federal Home Loan Bank System in Washington, D.C.

Mildred P. Wilson, who was Assistant Secretary of the Broadway Federal Savings and Loan Association at the time of the report in question [R. 274], identified the exhibit as being one which she prepared under the express instructions of the appellant, Mr. Howard [R. 275-277]. She then testified, “. . . after the report was completed then it also had to go to Mr. Howard’s desk, then, after he read it and approved it, then he gave it to me to send down to the Home Loan Bank, and that was what was done” [R. 278].

After a great deal of additional testimony as to the manner in which the report was prepared and the manner in which the accounts reflected by the report were maintained at the Broadway Federal Savings and Loan Association the exhibit, as Government’s Exhibit 22-X, was finally received in evidence [R. 345].

An examination of the exhibit itself reveals that it is one of the forms used by the Federal Home Loan Bank System. Mr. Noon’s testimony bore this out [R. 270]. Mailing instructions on the reverse side of the exhibit read as follows:

“MAILING INSTRUCTIONS

Association should retain original; send one copy to Federal Home Loan Bank of which a member, and two copies to Chief Supervisor, Federal Home Loan Bank System, Washington 25, D.C.”

The regulation set forth at 24 C. F. R. 143.5 (Appendix, p. 9) provides that these reports should be made; that one copy should be forwarded to the Federal Home Loan

Bank of which the association is a member, and that two copies should go to the Governor of the Federal Home Loan Bank System in Washington, D.C. The regulation as to supervision of Savings and Loan Associations (Appendix, p. 10), set forth at 24 C. F. R., 1943 Supp., 6.2, 8 F. R. 9865, provides that the Chief Supervisor shall be responsible under the Governor of the Federal Home Loan Bank System for supervision of all member institutions.

From the files of the Broadway Federal Savings and Loan Association appellant produced that association's copies of the monthly reports to the Board of Directors for the first six months of operations, from January 31, 1947, to and including June 30, 1947 [R. 373]. These reports were kept and prepared in the due course of business [R. 373]. They were received in evidence as Defendant's Exhibit E5-22 [R. 373] and later designated as a part of the record on this appeal [R. 107]. From these reports it was apparent that it was the practice at the Broadway Federal Savings and Loan Association, during early 1947 at least, to list all loans as Direct Reduction Loans [R. 373-374]. All of these reports were signed by Mildred P. Wilson [R. 375]. On direct examination appellant identified these reports as the regular monthly reports to the directors of the Broadway Federal Savings and Loan Association [R. 378-379] and testified that the forms for the reports came from the Home Loan Bank [R. 376] and that they were typed up by Mildred P. Wilson [R. 380]. Appellant then testified that in November, 1947, the Home Loan Bank *Board* notified his association that they had made an error in compiling the monthly report "to the Home Loan Bank *Board*" because of the manner in which they lumped all loans

together as "Direct Reduction Loans" [R. 388]. In this connection it is pointed out that the appellee is not here concerned with the manner in which these reports were made, that is, not concerned with bookkeeping procedures, but only with the fact that the entries were false and that they were made to the Home Loan Bank Board.

When one considers the above facts, together with the fact that the Federal Home Loan Banks are agents of the Federal Home Loan Bank Administration for supervisory purposes (Regulations—ORGANIZATION OF THE BANKS, Appendix, p. 7), it is apparent that Government's Exhibit 22-X was in truth a report to the Federal Home Loan Bank Board as described in the indictment [R. 13-14].

(2) The Court Properly Denied Appellant's Motion for Judgment of Acquittal on the Ground That There Was No Evidence to Show the Appellant's Intent to Deceive the Home Owners' Loan Corporation or the Federal Home Loan Bank Board, Its Auditors and Examiners.

In connection with this argument it is interesting to note that at page 4 of his Opening Brief the appellant admits to the falsity of the entry reflected in Government's Exhibit 22-X.

Mildred P. Wilson testified that the report was prepared under the appellant's instructions [R. 275-277] and that the appellant saw this particular report and approved it before it was sent out [R. 278]. She further testified [R. 283],

"Mr. Howard said that we were going to make loans, collateral loans on certificates already held by

certain persons in the association. After that he was going to open a savings account for each of these persons, thereby setting up a new . . . thereby setting up a loan, an additional loan for the association, and also an additional share account. After the statement went to the Home Loan Bank, we would cancel these loans, and that was all there was to it."

Mrs. Wilson later testified [R. 341] that she had a conversation with the appellant relative to listing collateral loans on Exhibit 22-X, and that appellant said that he wanted all loans grouped under one heading, "Direct Reduction Loans," and that [R. 342] appellant said that, "We were going to set these collateral loans up and after the report was sent in to the Federal Home Loan Bank, we would cancel them off."

The appellant failed to deny any of the above testimony of Mildred P. Wilson, when he later testified in his own behalf at the trial.

There was a great deal of testimony establishing that at least two of the loans listed on the books of the Broadway Federal Savings and Loan Association on June 30, 1947, were false and fraudulent and were based upon forged share loans on the certificates of John M. Anderson and his wife, Mary C. Anderson. The two false and fraudulent loans totalled \$8,500.00 [R. 208-240] and were included in the total of loans reflected in Exhibit 22-X, the monthly report of June 30, 1947, to the board of directors and the Federal Home Loan Bank Board,

and tended to "water" that report by a corresponding amount.

Appellant presented this report to the Board of Directors of the Broadway Federal Savings and Loan Association at a meeting held on July 11, 1947 [R. 383]; the report presented was Exhibit 22-X [R. 384] and reflected total assets as of June 30, 1947, at \$372,156.56 [R. 384 and R. 386]. This is the same figure appearing on Exhibit 22-X. Appellant referred with pride to this figure [R. 386] and informed the Board of Directors that *the total loan value at that time* amounted to approximately \$360,000.00 [R. 386]. He then pointed out the number of Investment Share Accounts and *the number of loan accounts* [R. 386].

Appellant testified that he first saw the collateral loan cards and re-purchase slips pertaining to the two fraudulent loans in July of 1947 [R. 391] when they were brought to his attention by his auditor, Mr. Bonnet, and that he was told that this practice was usual among savings and loan associations in the first period of their operation when they usually inflate their assets [R. 392, 410]. There were several other such loans on the books on June 30, 1947, in addition to the two forming the basis of Count 22 [R. 392, 418]. Appellant fixes his conversation with Mr. Bonnet at between the 1st and the 14th day of July [R. 409]. He admits having signed the checks used in paying off the "loans" [R. 390]. It was established that the two fraudulent loans in question were cancelled on July 14, 1947 [R. 415], three days after the

meeting in which he informed the Board of Directors of the number of loans that had been made to that date by the association [R. 387].

The testimony of appellant when cross-examined in this regard is enlightening [R. 416-419]:

“By Mr. Danielson: Mr. Howard, you were with the Broadway for 32 months. You are familiar with what collateral loans are. They are collateral loans secured by shares? A. That is correct.

Q. Those are the ones you can loan up to 90 per cent? A. Yes, sir.

Q. You have gone over these John and Mary Anderson transactions right here in court? A. Yes. I listened to that.

Q. And you examined them together with your counsel here yesterday, didn't you? A. Not much. Very little.

Q. To refresh your recollection then, as to the John Anderson account, he had an account of \$5,000 in the Broadway, didn't he? A. Yes, sir.

Q. And on or about June 28, 1947, a collateral loan was opened up in the amount of \$4,500 on it, wasn't it? A. It would appear that way, yes.

Q. And on the same date, June 28, at least, a new investment share ledger in the same amount, \$4,500, was opened up, wasn't it? A. That is correct.

Q. As to Mary Anderson's account, she had account 20 in the amount of \$5,000, didn't she? A. That is correct.

Q. And on June 27, 1947, a collateral loan of \$4,000 was placed on that account, wasn't it? A. That is correct.

Q. On the same date, June 27, 1947, a new investment share ledger in the amount of \$4,000 was put in that account? A. It appears that way.

Q. And it was cancelled off on July 14. A. That is right.

Q. There was no interest collected on that account was there? A. None, according to my knowledge. The board of directors will reflect that, also, in the minutes.

Q. As to John Anderson, there was no interest collected on that, either? A. None.

Q. These loans were on June 27 and June 28, 1947. I direct your attention to Government's Exhibit 22-Y, the ledger sheet, 1210. Prior to June 27, there had been five collateral loans granted at the Broadway, is that not correct? (The entries on Exhibit 22-Y were made by Mildred Wilson and reflect the collateral loans set up in the latter part of June, 1947, which were later cancelled off during July, 1947—R. 341 to 343.) A. I don't know.

Q. Will you count them? A. I saw three.

Q. Well, prior to June 27, there had been five. A. Yes.

Q. With a total balance of \$1,900. A. Yes.

Q. On June 27th and 28th, these two days, we have a ten collateral loan set-up. A. That is correct.

Q. And the total balance then was \$25,800. A. It appears that way.

Q. Then on July 10, we had—well, between July 10th and 30th, we had six of them removed, is that not correct, or credited? A. It appears that way.

Q. Leaving a balance of \$1,320. A. That is correct.

Q. So only on June 30, 1947, that was the only time you had a balance of \$25,800? A. It appears that way.

Q. As of January 11, 1949—well, we can go further. As of the end of 1949, after three years of operation, there were \$38,017.07, is that correct? A. That is correct.

Q. And on this check No. 417, Mary Anderson, \$4,000, that is your signature as one of the signers, is it not? A. Yes, sir. It required two signatures.

Q. And on this check 416? A. That's right.

Q. That is your signature as one of the signers? A. Yes.

Q. That is to John Anderson? A. Yes, that's right."

It is fundamental that the law presumes a person to intend to do what he actually does; that he intends the natural and necessary consequences of his voluntary act. (*Haugen v. U. S.* (9 Cir., 1946), 153 F. 2d 850; *U. S. v. Randall* (7 Cir., 1947), 164 F. 2d 284.) Here the appellant inflated the assets of the Broadway Federal

Savings and Loan Association by placing on the books false and fraudulent loans. He thereby caused the monthly report of the association to be inflated in the amount of the loans and, since that report, by regulation, was a report which must be forwarded to the Federal Home Loan Bank Board the effect of his act was to deceive that Board and its auditors and examiners.

Appellee submits that the admittedly false report, Exhibit 22-X, prepared under the appellant's supervision, was intended to deceive whatever person or agency should receive it; that is, those to or for whose benefit or information it was prepared and to whom it was transmitted. The evidence established that this exhibit was transmitted to the Federal Home Loan Bank System, as well as the local Federal Home Loan Bank. In view of the evidence, the jury was justified in finding that the requisite intent accompanied the act.

(3) The Court Properly Denied Appellant's Motion for Judgment of Acquittal on the Ground That the Federal Home Loan Bank Board Was Not in Existence on June 30, 1947.

Appellant argues that as the result of Executive Order No. 9070, effective February 24, 1942 (Appendix, p. 6), the Federal Home Loan Bank Board was not in existence on the date of the offense charged in Count 22 of the indictment, June 30, 1947, and that, therefore, he could not be guilty of the offense charged in that count of the indictment.

Executive Order No. 9070 was issued pursuant to the First War Powers Act, 1941 (Appendix, p. 3), Section 5 of which provides in part:

“That all laws, or parts of laws, conflicting with the provisions of this title are to the extent of such conflict *suspended* while this title is in force.” (Emphasis added.)

The section goes on to provide that on the termination of that title all government agencies, etc., . . .

“shall exercise the same functions, duties, and powers as heretofore, or as hereafter, by law may be provided, any authorization of the president under this title to the contrary notwithstanding.”

Section 3 of Executive Order No. 9070 provided that the chairman of the Federal Home Loan Bank Board should serve as the Federal Home Loan Bank Commissioner. Thus, it is apparent that Executive Order No. 9070 merely transferred the functions of the Federal Home Loan Bank Board to the National Housing Agency, and that the Board was still in existence on June 30, 1947.

Reorganization Plan No. 3 of 1947 (Appendix, p. 4) (A. B. 37) effective July 27, 1947, transfers the functions, *et cetera*, of the “Federal Home Loan Bank Board” to its successor agency. It is obvious that this transfer could not be accomplished if the Board did not exist at that time. This transfer took place nearly a month after the date alleged in Count 22. Appellant was aware of these facts and of the effective date of the reorganization plan (A. B. 19). It is submitted that his argument in this regard is frivolous.

ARGUMENT ON COUNT TWENTY-FOUR.

Appellant's first specification of errors under Count 24 is in two parts, First, that the making of a false entry in a report to the Federal Home Loan Bank Board is not a crime under 18 U. S. C. 1006, and, Second, that the Federal Home Loan Bank Board was not in existence on March 22, 1949.

1(a) The Making of a False Entry in a Report to the Federal Home Loan Bank Board Is Made an Offense by 18 U. S. C. 1006.

A careful reading of that portion of 18 U. S. C. 1006 which is pertinent to this case reveals that the section can properly be divided into three parts.

The first part defines the class of person who can commit the act made criminal. The listing of various governmental agencies serves only to modify the pronoun "whoever". This portion is as follows:

PART 1.

"Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, Home Owners' Loan Corporation, Farm Credit Administration, Federal Housing Administration, Federal Farm Mortgage Corporation, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States, . . ." (Emphasis added.)

PART 2.

The second part of the Statute describes the intent which will make the act a crime, if such intent is coupled with such act. That part of the section is as follows:

“ . . . *with intent to defraud any such institution or any other company, body politic or corporate, or any individual, or to deceive any officer, auditor, examiner or agent of any such institution or of department or agency of the United States, . . .*”
(Emphasis added.)

PART 3.

The third part of the section describes the act which is made unlawful by the statute. It reads as follows:

“ . . . makes any false entry in any book, report or statement of or to any such institution, . . . ”

It is apparent that the purpose of the Statute is to make it unlawful for a particular class of person (Part 1), with intent to defraud or deceive a described class (Part 2), to make a false entry in a book, report, or statement to such institution (Part 3). The statute is designed to protect a certain class of persons (Part 2), from fraud or deceit by another class (Part 1), by means of false entries in reports to “such institutions” (Part 3). The persons to be protected are the persons who are the potential victims of the fraud and/or deceit. Since the particular class of fraud and/or deceit which is made unlawful is that flowing from a false entry in a report to “such institutions” the expression “such institutions” must refer to those who could be the objects of the fraud and/or deceit. In other

words, "such institutions," as contemplated by Part 3, must refer to the class defined in Part 2, as set forth above.

The Reviser's Notes to 18 U. S. C. 1006 state that the new section is based upon eleven sections of the old United States Code and that among these is 12 U. S. Code 1467(c). The Reviser's Notes go on to state:

"Each revised section condenses and simplifies the constituent provisions without change of substance except as herein indicated.

"The term 'or of any department or agency of the United States' was inserted in order to clarify the sweeping provisions against fraudulent acts and to eliminate any possible ambiguity as to scope of section. (See definitions of 'department' and 'agency' in section 6 of this title.)"

The new section was based in part upon the old 12 U. S. Code 1467(c) which made unlawful a false entry in a report to the Federal Home Loan Bank Board. The Reviser's Notes clearly point out that no change in substance was intended and in addition point out that the words "department or agency of the United States" were added "to clarify the sweeping provisions against fraudulent acts and to eliminate any possible ambiguity as to scope of section." If these notes have any significance it must be that the Federal Home Loan Bank Board is to be protected by the provisions of the new section. This court has held that the Reviser's Notes do have significance. *Kirk, et al. v. United States* (9 Cir., 1950), 185 F. 2d 185, 188.

1(b) **An Indictment May State an Offense Against the United States Even Though It Refers to the Home Loan Bank Board as the Federal Home Loan Bank Board.**

Appellant argues that Count 24 of the indictment fails to state an offense against the United States since the functions of the Federal Home Loan Bank Board were transferred to the Home Loan Bank Board by Reorganization Plan No. 3, 1947, effective July 27, 1947, nearly two years before the date of the offense charged in Count 24, March 22, 1949. His objection is to the use of the word "Federal" in the designation of the Board (A. B. 38.)

Actually, Section 9 of Reorganization Plan No. 3 (Appendix, p. 5), abolished the Federal Home Loan Bank Board, but not until all of its functions were transferred to the Home Loan Bank Board. (See Section 2 of the Reorganization Plan, Appendix, p. 5.) The Reorganization Plan was submitted by the President pursuant to the authority granted him by the Reorganization Act of 1945 (Appendix, p. 3). Section 9 of that act provides, in pertinent part:

"Any statute enacted, . . . in respect of . . . any agency or function transferred to . . . any other agency or function under the provisions of this Act, before the effective date of such transfer, . . . shall, . . . have the same effect as if such transfer, . . . had not been made; . . ."

Thus it is apparent that the Congress did not intend that the reorganization brought about by this plan should have the effect attributed to it by the appellant, and that the Federal Home Loan Bank Board or Home Loan Bank

should no longer have the protection afforded to it by 12 U. S. Code 1467(c) or by its successor, 18 U. S. C. 1006.

Penal statutes should be strictly construed, but this does not mean that they should be given so narrow a meaning as to distort them or to nullify the evident meaning and purpose of the legislation. They should be given their fair meaning in accord with the evident intent of Congress. *U. S. v. Sullivan* (1948), 332 U. S. 689, 68 S. Ct. 331; *U. S. v. Brown* (1948), 333 U. S. 18, 25-26; *U. S. v. Monstad, et al.* (9 Cir., 1943), 134 F. 2d 986.

It is submitted that in common usage the term "Federal Home Loan Bank Board" is, even today, synonymous with "Home Loan Bank Board" and that the Appellant was not misled by the inclusion of the word "Federal" in the name of the board as it is set forth in the indictment. In this connection it is noted that the Reorganization Plan was effective July 27, 1947. Yet the regulations governing Federal Savings and Loan Associations were not revised to conform to these changes in nomenclature until seventeen months later, on December 17, 1948. See Resolution #1285, December 17, 1948, Appendix, p. 6, 13 F. R. 8266. Section 1014 of the new Title 18, U. S. Code, effective September 1, 1948, and amended May 24, 1949, *still carries the full designation, "Federal Home Loan Bank Board."* Frank C. Noon, who had been with the Home Loan Bank for eighteen years at the time of his testimony, testified that he was then "supervisory agent for the *Federal Home Loan Bank Board.*" [R. 240.] (Emphasis added.)

The appellant cannot possibly have been misled by the inclusion of the word "Federal" in the name of the board. There could not have been any other board with a similar

name; the use of the word "Federal" or of the words "Federal Home Loan Bank" or a combination or variation of them with other words is prohibited by law. 12 U. S. Code 1441(d) and 18 U. S. C. 709. It is well settled that where the variance between the indictment and the proof could not possibly mislead the defendant such a variance is not material, *Meyers v. U. S.* (2 Cir., 1924), 3 F. 2d 379; *U. S. v. Rabinowitz* (1949), 176 F. 2d 732; *U. S. v. Rosenblum* (1949), 176 F. 2d 321, and that a variance between the indictment and the proof is immaterial unless the substantial rights of the accused have been prejudiced. A variance should not be regarded as material where the defendant could not have been misled at the trial or deprived of protection against another prosecution for the same offense. *Berger v. U. S.* (1935), 295 U. S. 78, 55 S. Ct. 629. The error in adding the word "Federal" to the title of the Home Loan Bank Board would, therefore, be harmless error within the meaning of Rule 52(a) of the Federal Rules of Criminal Procedure, and should be disregarded. That rule reads:

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

See also:

Himmelfarb v. U. S. (9 Cir., 1949), 175 F. 2d 924, 936;

U. S. v. Schwartz et al. (2 Cir., 1945), 150 F. 2d 628, cert. den. 326 U. S. 757;

Cummings v. U. S. (5 Cir., 1942), 131 F. 2d 107.

2. Exhibit 24-B Was Properly Admitted Into Evidence.

At the outset it is pointed out that in his brief Appellant has based his argument on the fundamental misconception that Count 24 charges Appellant with making an entire false report to the Federal Home Loan Bank Board (A. B. 41, 42). Actually, the indictment describes the false entry as “. . . namely: an affidavit of the president of said association attached to the report of examination of said association . . .” The pertinent portions of Count 24 read: “*On or about March 22, 1949, . . . Herbert A. Howard . . . with intent to deceive the Home Owner's Loan Corporation and the Federal Home Loan Bank Board, its auditors and examiners, did make and cause to be made a false entry in a report to the Federal Home Loan Bank Board, namely, an affidavit of the president of said association attached to the report of examination of said association as at the close of business March 8, 1949, which said affidavit is false in that it alleges that all of the assets recorded on the association's books . . . and that the signatures appearing thereon are genuine, whereas in truth and in fact there were recorded . . . the following notes bearing the signature of . . . one Vashti Peake: . . . Loan #274—Vashti Peake, and said signatures were false and forged . . .*”

The testimony of Frank C. Noon, at the time he produced Exhibit 22-B, is set forth at pages 254-255 of the transcript of record on appeal and at pages 22 and 23 of

Appellants' Opening Brief. Mr. Noon was "manager of the Los Angeles branch of the Federal Home Loan Bank of San Francisco and supervisory agent for the Federal Home Loan Bank Board" [R. 240]. He was asked whether he had the ". . . report of the Federal Savings and Loan Association's Examiner pertaining to the Broadway Federal Savings and Loan Association dated on or about March 22, 1949." The language used is very nearly identical to that used in Count 24 of the indictment. He replied, "I have a certificate of the examiner in charge and *the affidavit of the president* or secretary on the same sheet." He also testified that the affidavit was dated March 22, 1949, the identical date alleged in the indictment as the date when Appellant made or caused to be made the false entry. Before further questions could be asked the Court admitted the exhibit into evidence but immediately thereafter and before any additional testimony, it was established that the document was a part of the official records of Mr. Noon's office.

The testimony of Frank C. Noon clearly identified the affidavit as the affidavit described in Count 24 of the indictment, the falsity of which is the basis of that count. As such it was properly admitted into evidence. Any other circumstances showing knowledge or lack of knowledge of the document by the witness could go to the weight of the evidence but not to its admissibility.

Appellant later admitted that the signature on the affidavit, Exhibit 24-B, was his signature [R. 403] and that he signed it at the instance and request of Mr. Manley [R. 403-404, 419-420] (A. B. 23-24) and that he knew

Mr. Manley to be “. . . one of the examiners” [R. 419] and that Manley made an examination of the Broadway in 1949 and that “. . . He was there between two and three weeks” [R. 420]. There can be no doubt that Appellant was fully aware of what he was signing when he signed the affidavit in question.

3(a) The Court Did Not Err in Refusing to Give Defendant Instruction No. 3.

It is fundamental that a Court's instructions should be considered as a whole and that it is not error to refuse an instruction if that instruction is adequately covered by other instructions given or by the general charge.

Stein et al. v. U. S. (9 Cir., 1948), 166 F. 2d 851;

McCoy v. U. S. (9 Cir., 1948), 169 F. 2d 776, 785.

Defendant's requested instruction No. 3 relates to the manner in which the jury should judge the credibility of the witnesses. Appellant points out that it was intended to apply to the testimony of Mildred P. Wilson (A. B. 43). The Court gave instructions on credibility of witnesses which fully set forth the law as to the manner in which the jury should judge the credibility of the witnesses [R. 466, 471]. Furthermore [R. 468], the Court gave an instruction which is identical in substance and effect with defendant's instruction No. 3.

In addition, the requested instruction would, at most, apply only in the event the appellant had made an oral admission or oral confession which was used against him during the trial. The testimony which appellant considers as an admission [R. 339; A. B. 44-45] amounts to neither a confession nor admission. Therefore, there was no reason to give the requested instruction.

3(b) The Court Did Not Err in Refusing Defendant's Requested Instruction No. 62.

This requested instruction [R. 72-73; A. B. 47] sets forth what appellant considers to be one of the elements of the offense charged in Count 24 under 18 U. S. C., Section 1006. The Court gave an instruction on the elements of the offense charged in Count 24 [R. 454, 455] in which the jury was clearly instructed that, in order to be an offense, the defendant must make and cause to be made a false entry “. . . in a report to the Federal Home Loan Band Board”

Inasmuch as the requested instruction was adequately covered by other instructions there was no error in the Court's refusal to give the instruction.

4(a) The Court Did Not Err in Giving the Instruction Relative to Presumptions Set Forth at Page 465 of the Transcript of Record.

As stated above a Court's instructions to the jury must be considered as a whole and each instruction is to be regarded in the light of all of the others. The instruction challenged by appellant defines a presumption and informs the jury that such presumption must be followed until overcome or outweighed by evidence to the contrary. The instruction which appellant holds out as the proper instruction under the circumstance covers a different field entirely. It does not define a presumption, but rather it describes the effect of the presumption of innocence. In addition to the instruction [R. 459, lines 12-20; A. B. 49] which appellant contends is correct, the Court gave additional instructions on the presumption

of innocence [R. 458, lines 18-26, and 460, line 25, to 461, line 3] which are even stronger than that set forth at page 459.

Appellant also argues that the challenged instruction is not good because it does not include *within itself* an instruction to the effect that a jury must be convinced beyond a reasonable doubt (A. B. 50). An examination of the Court's instructions reveal that they are replete with references to the doctrine of reasonable doubt [R. 459, 460, 461, 462, 463, 467, 468, 469, 470, 471, 472, 476, 477, 479].

4(b) The Court Did Not Err in Giving the Instruction on Proof Beyond a Reasonable Doubt Set Forth at Page 459 of the Transcript of Record.

If one considers the entire instruction rather than that portion set forth in appellant's brief, it becomes apparent that the Court properly defined "reasonable doubt." The entire instruction reads [R. 459-460]:

"A reasonable doubt is a fair doubt based upon reason and common sense and arising from the state of the evidence. It is rarely possible to prove anything to an absolute certainty. Proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely and act upon in the most important of your own affairs. A defendant is not to be convicted on mere suspicion or conjecture.

"A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant

has the right to rely upon a failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross-examination of witnesses for the prosecution. The law does not impose upon a defendant the duty of producing any evidence.

“A reasonable doubt exists in any case when, after careful and impartial consideration of all the evidence, the jurors do not feel satisfied to a moral certainty that a defendant is guilty of the charge.”

In addition to the foregoing, the Court's references to the doctrine of reasonable doubt in its instructions to the jury, which are referred to in Section 4(a) of this argument, above, adequately instructed the jury on the doctrine of reasonable doubt.

5(a)(b) There Is Substantial Evidence That a Report of Examination of the Broadway Federal Savings and Loan Association at the Close of Business March 8, 1949, Was Made to the Federal Home Loan Bank Board on or About March 22, 1949.

Defendant's arguments 5(a) and (b) on Count 24 are being answered jointly since each is based upon identical facts.

It is again pointed out that Count 24 charges that on or about *March 22, 1949*, appellant made and caused to be made a false entry in a report to the Federal Home Loan Bank Board, namely: an *affidavit of the president* of said association *attached to the report of examination* of said association as at the close of business *March 8, 1949*. It was not alleged that appellant had anything to do with the report proper, that is, with the report of examination itself. The charge is that the appellant made

an affidavit which was false and which affidavit was attached to the report of examination of the association. That affidavit asserts that all notes supporting assets on the association's books were in force and effect and that the signatures thereon were genuine.

An examination of Exhibit 24-B reveals that it is a certificate of the examiner in charge relative to the examination of the association as at the close of business on March 8, 1949, and that the examiner's certificate and the affidavit of the appellant, H. A. Howard, were executed on March 22, 1949.

The appellant admitted signing the affidavit [R. 403-404, 419] and that the examiner, Mr. Manley, was at the Broadway making the examination for “. . . between two and three weeks” [R. 420].

The testimony of Frank C. Noon clearly establishes that there was such a report of examination and that Exhibit 24-B was page 17 of that report. The pertinent testimony reads [R. 266, line 12, to 269, line 15]:

“Q. By Mr. Rose: This is the last page of a report that was handed to your office by Orville M. Manley, Examiner, and I am referring to Plaintiff's Exhibit 24-B.

Mr. Danielson: Government's Exhibit 24-B.

Mr. Rose: I know you represent the government.

The Witness: That is the certification that is attached to the copy of the report that went to the Chief Examiner in Washington.

Q. By Mr. Rose: You have the rest of the report, or a copy of the rest of the report, in your office files, have you not? A. I have.

Q. As a matter of fact, this is page 17 of the report and it is so marked at the bottom of the page, is that true? A. That is correct.

Q. Could you produce tomorrow the other 16 pages that belong to that report? A. Yes.

Mr. Danielson: If your Honor please, we will object to that coming in at this time. Our indictment only charges a false affidavit and, frankly, I don't think the defendant—well, it would be error if the government tried to introduce the entire report. It would be hearsay as to this defendant.

The Court: How is the report going to affect this case, Mr. Rose?

Mr. Rose: Your Honor, I will show when this affidavit was signed, it was not part of any report of the government, it was not authorized to be a report to the Federal Home Loan Bank Board and Mr. Howard has never seen the report. How could he, under those circumstances, make a report to the Home Loan Bank Board?

The Court: If you want the report here for the purpose of establishing the fact that Mr. Howard has never seen it, I think maybe it is competent for that reason, but why have it here in the morning? You are not going to have Mr. Howard on the stand tomorrow.

Mr. Rose: I thought if there was evidence by any other witness, the examiner or possibly someone else, I would like to have that report in court to confront them with that.

Mr. Danielson: If your Honor please, that would be part of an affirmative defense, if anything.

The Court: That's right. You are anticipating a defense. I won't require this witness to bring in the report tomorrow, but if you want the report

when you present your testimony, I will be glad to have it here.

Mr. Rose: It is perfectly all right if he brings it next Monday.

Mr. Neukom: We will bring it then.

Mr. Rose: I want him to bring it, not you.

The Court: This witness will bring in the report any time you notify him. He is not going out of town, I don't suppose.

Q. By Mr. Rose: Is that correct? A. If so, it will be for a day or two.

Q. Could you bring it in next Monday then? A. I can bring it in any time.

Q. Will you bring it in Monday morning at 10:00 o'clock? A. Yes.

Mr. Rose: Thank you.

The Court: I don't know why you want him here Monday, because we won't be trying this case on Monday.

Mr. Rose: Tuesday, I mean, because the government will be through by Tuesday.

The Court: Tuesday, yes.

Q. By Mr. Ross: You don't know under what circumstances you received that last page over there, of your own knowledge, do you? A. Yes.

Q. Who handed that last page to you? A. I wrote to the Chief Supervisor in Washington in response to a subpoena and asked him to send it to me, and I received it in the mail.

Q. I know. Maybe my question wasn't clear. You don't know how that last page came into the hands of any government branch, do you? A. No.

Q. You don't know under what circumstances that signature of Mr. Howard, if it is Mr. Howard's

signature, came to be on that piece of paper? A. No, I have no personal knowledge of it.”

Thus, it is apparent that the report in question did exist and that it was available to the appellant for use in the trial in the event he should have seen fit to use it.

In this connection, it is pointed out that Frank Noon received the report from the Chief Supervisor in Washington after he wrote to the Chief Supervisor and asked that it be sent to him. Noon then received it in the mail. It is settled that this is sufficient authentication of the document.

7 *Wigmore*, Sec. 2153;

Scofield, et al. v. Parlin & Orendorff Co. (7 Cir., 1894), 61 Fed. 804;

National Acc. Soc. v. Spiro (6 Cir., 1897), 78 Fed. 774.

5(c) and (e) There Is Substantial Evidence That Appellant's Affidavit Was Made With Intent to Deceive as Charged in Count 24 and That Appellant Knew That the Signature of Vashti Peake on Exhibit 24-A Was False and Forged.

Appellant's arguments 5(c) and (e) are being answered jointly since each is based upon the same facts.

Appellant argues that the evidence submitted in this connection pertains only to a trust deed attached to government's Exhibit 24-A and that it does not pertain to the note, which is the basis of the charge in Count 24 (A. B. 55 and 56).

The promissory note in question was identified by Margaret Russell, bookkeeper at the Broadway Federal Savings & Loan Association, and the note and deed were

identified as parts of loan No. 274 of the Broadway Federal Savings & Loan Association [R. 189, 193]. Vashti Peake Cottman was later shown the note and the trust deed, which were parts of the documents constituting loan No. 274, and she positively testified that the signature upon the *note* was not her signature and that the signature "Vashti Peake" on the deed was likewise not her signature [R. 196]. She likewise testified that she had never owned any real estate [R. 197] and that she had never borrowed or received any money from, or owed any money to, the Broadway Federal Savings & Loan Association [R. 198]. The note and the trust deed were admitted in evidence as one exhibit, Exhibit 24-A [R. 205].

Mildred P. Wilson testified that she had notarized the signature "Vashti Peake" on the deed of trust, which is a part of Exhibit 24-A, at the request of appellant H. A. Howard [R. 337-339; A. B. 26-27].

Frank C. Noon was shown Exhibit 24-A [R. 247, 248] and he then testified that he had questioned the appellant about the transaction known as Loan No. 274, of which this exhibit was a part, and that appellant had admitted to him that he was the owner of the property covered by that loan and that Vashti Peake was a "dummy" for him.

Thus, there was sufficient evidence to permit the jury to conclude that the appellant knew that the signature of Vashti Peake on the promissory note, Exhibit 24-A, was false and forged and that his affidavit was made with intent to deceive, as charged in the indictment.

5(d) No Argument Is Here Being Set Forth at This Point to Refute Appellant's Argument That the Federal Home Loan Bank Board Did Not Exist as of March 22, 1949. That Contention Has Been Covered Completely in the Argument on Count 24 Set Forth Under 1(b) at Page 20 Above.

In his closing pages appellant goes on to argue that the evidence upon which appellant was convicted of Count 24 consists of inferences drawn upon inferences. In reading appellant's argument it becomes immediately apparent that he has chosen to attribute all inferences to one and the same fact, whereas the three conclusions which he lists are all drawn from different facts.

As to the first "inference," there was a great deal of testimony, which is set forth above, to the effect that a report was made by an examiner of the Broadway Federal Savings and Loan Association, Orville M. Manley, and that Exhibit 24-B was the 17th and last page of that report.

As to the second "inference," appellant admitted his signature upon the affidavit, which affidavit is, itself, dated March 22, 1949. It is apparent that the jury chose to believe the document and other witnesses rather than the testimony of the appellant.

As to the third "inference," evidence justifying this conclusion is set forth in argument 5(c) and (e), above.

Conclusion.

The crimes here charged are making false entries in reports to a government agency. The statutes and regulations under which the prosecution was brought are sufficient. The evidence points conclusively to guilt. The judgment below should be affirmed.

Respectfully submitted,

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APPENDIX.

Statutes and Regulations Involved.

(a) Penal Statutes.

Section 1467(c) of Title 12, U. S. Code, a violation of which is charged in Count 22, provides:

“(c) Whoever, being connected in any capacity with the Board or the Home Owners’ Loan Corporation or an association (1) embezzles, abstracts, purloins, or willfully misapplies any moneys, funds, securities, or other things of value, whether belonging to it or pledged or otherwise intrusted to it; or (2) with intent to defraud the Board or the Home Owners’ Loan Corporation or an association, or any other body politic or corporate, or any individual, or to deceive any officer, auditor, or examiners of the Board or the Home Owners’ Loan Corporation or an association, makes any false entry in any book, report, or statement of or to the Board or the Home Owners’ Loan Corporation or an association, or, without being duly authorized, draws any order or issues, puts forth, or assigns any note, debenture, bond, or other obligation, or draft, mortgage, judgment, or decree thereof, shall be punished by a fine of not more than \$10,000, or by imprisonment for not more than five years, or both.”

Count 24 charges a violation of 18 U. S. C. 1006, which provides:

“Federal credit institution entries, reports and transactions.

Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance

Corporation, Federal Deposit Insurance Corporation, Home Owners' Loan Corporation, Farm Credit Administration, Federal Housing Administration, Federal Farm Mortgage Corporation, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for co-operatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States, with intent to defraud any such institution or any other company, body politic or corporate, or any individual, or to deceive any officer, auditor, examiner or agent of any such institution or of department or agency of the United States, makes any false entry in any book, report or statement of or to any such institution, or without being duly authorized, draws any order or bill of exchange, makes any acceptance or issues, puts forth or assigns any note, debenture, bond or other obligation, or draft, bill of exchange, mortgage, judgment, or decree, or, with intent to defraud the United States or any agency thereof, or any corporation, institution, or association referred to in this section, participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such corporation, institution, or association, shall be fined not more than \$10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 750, amended May 24, 1949, c. 139, §20, 63 Stat. 92."

(b) Other Statutory Provisions.

The First War Powers Act, 1941, 55 Stat. 838-841, provides in part:

“SEC. 2. That in carrying out the purposes of this title the President is authorized to utilize, coordinate, or consolidate any executive or administrative commissions, bureaus, agencies, governmental corporations, offices, or officers now existing by law, to transfer any duties or powers from one existing department, commission, bureau, agency, governmental corporation, office, or officer to another, to transfer the personnel thereof or any part of it either by detail or assignment, together with the whole or any part of the records and public property belonging thereto.”

“SEC. 5. That all laws or parts of laws conflicting with the provisions of this title are to the extent of such conflict suspended while this title is in force.

“Upon the termination of this title all executive or administrative agencies, governmental corporations, departments, commissions, bureaus, offices, or officers shall exercise the same functions, duties, and powers as heretofore or as hereafter by law may be provided, any authorization of the President under this Title to the contrary notwithstanding.”

The Reorganization Act of 1945, 59 Stat. 613 ff, 5 U. S. C. 133y to 133y-16 provides in part:

“SEC. 4. Any reorganization plan transmitted by the President under section 3—

(1) shall change, in such cases as he deems necessary, the name of any agency affected by a reorganization, and the title of its head; . . .”

“SEC. 8. For the purposes of this Act any transfer, consolidation, coordination, abolition, change or designation of name or title, . . . shall be deemed a ‘reorganization.’ ”

“SEC. 9(a)(1). Any statute enacted, and any regulation or other action made, prescribed, issued, granted, or performed, in respect of or by any agency or function transferred to, or consolidated or coordinated with, any other agency or function under the provisions of this act, before the effective date of such transfer, consolidation, or coordination, shall, except to the extent rescinded, modified, superseded, or made inapplicable by or under authority of law, have the same effect as if such transfer, consolidation, or coordination had not been made; but where any such statute, regulation, or other action has vested functions in the agency from which the transfer is made under the plan, such functions shall, insofar as they are to be exercised after the transfer, be considered as vested in the agency to which the transfer is made under the plan.

(2) As used in paragraph (1) of this subsection the term ‘regulation or other action’ means any regulation, rule, order, policy, determination, directive, authorization, permit, privilege, requirement, designation, or other action.”

Reorganization Plan No. 3 of 1947 (effective July 27, 1947), 61 Stat. 954-956, 12 F. R. 4981 ff, 3 CFR Ch. IV (1947 Ed.) 5 U. S. C. 133y-16, provides in part:

“SECTION 1. *Housing and Home Finance Agency.* The Home Owners’ Loan Corporation, the Federal Savings and Loan Insurance Corporation, the Federal Housing Administration, the United States Housing Authority,

the Defense Homes Corporation, and the United States Housing Corporation, together with their respective functions, the functions of the Federal Home Loan Bank Board, and the other functions transferred by this Plan, are consolidated, subject to the provisions of sections 2 to 5, inclusive, hereof, into an agency which shall be known as the Housing and Home Finance Agency. There shall be in said Agency constituent agencies which shall be known as the Home Loan Bank Board, the Federal Housing Administration, and the Public Housing Administration.

“SEC. 2. *Home Loan Bank Board.* (a) The Home Loan Bank Board shall consist of three members appointed by the President by and with the advice and consent of the Senate . . .”

“(c) Except as otherwise provided in subsection (b) of this section there are transferred to the Home Loan Bank Board the functions (1) of the Federal Home Loan Bank Board; (2) of the Board of Directors of the Home Owners’ Loan Corporation; (3) of the Board of Trustees of the Federal Savings and Loan Insurance Corporation; (4) of any member or members of any of said Boards, and (5) with respect to the dissolution of the United States Housing Corporation.”

“SEC. 9. *Abolitions.* The Federal Home Loan Bank Board, the Board of Directors of the Home Owners’ Loan Corporation, and the Board of Trustees of the Federal Savings and Loan Insurance Corporation, together with the offices of the members of said boards, the office of Federal Housing Administrator, and the office of Administrator of the United States Housing Authority, are abolished.”

(c) Regulations.

Regulations governing the Federal Home Loan Bank Board have been duly promulgated and published. From time to time some of them have been changed and others have remained unchanged. Pertinent regulations are here set forth, with changes as indicated:

(1) Definitions.

“The term ‘Act’ means the Federal Home Loan Bank Act as amended.” 24 CFR 1.1 (1939 Ed.).

“Bank. The term ‘Bank’ Means a Federal home loan bank established by the Board under the authority of the Act.” 24 CFR 1.2 (1939 Ed.).

The two above sections remain the same today.

“The term ‘Board’ means the Federal Home Loan Bank Board.” 24 CFR 1.3 (1939 Ed.).

The above section was changed by Resolution #1285, December 17, 1948, 13 F. R. 8266, to read:

“The term ‘Board’ means the Home Loan Bank Board or one or more of its officials who has been duly authorized by the Home Loan Bank Board to act in its behalf.” 24 CFR 121.3 (1949 Ed.).

(2) Other Regulations.

Pursuant to the authority granted in the First War Powers Act, 1941, the President, on February 24, 1942, issued Executive Order No. 9070, 7 FR 1529, 50 U. S. C. App. 601 (note), which provides in part as follows:

“1. The following agencies, functions, duties, and powers are consolidated into a National Housing Agency

and shall be administered as hereinafter provided under the direction and supervision of a National Housing Administrator:

* * * * *

(b) All functions, powers, and duties of the Federal Home Loan Bank Board and of its members.

* * * * *

3. There shall be three main constituent units in the National Housing Agency. Each such unit shall be administered by a commissioner acting under the direction and supervision of the National Housing Administrator. . . . *The unit administering the functions, powers, and duties of the Federal Home Loan Bank Board and its members shall be known as the Federal Home Loan Bank Administration, and the Chairman of the Federal Home Loan Bank Board shall serve as the Federal Home Loan Bank Commissioner. . . .*” (Emphasis added.)

Under the rules and regulations of the Federal Home Loan Bank Administration, the officers of the Federal Home Loan Banks were agents of the Federal Home Loan Bank Administration under some circumstances as delineated by the following regulations:

“PART 2—ORGANIZATION OF THE BANKS.

1. . . .

(b) *Duties of officers—* . . .

(3) *Officers as agents.* For the following purposes, the officers of a Bank, . . . shall be the agents of the Federal Home Loan Bank Administration, (and) the Federal Savings and Loan Insurance Corporation. . . .

It shall be the specific duty of such agents to give consideration to . . . insurance of accounts by the Federal Savings and Loan Insurance Corporation, and investments by the Home Owners' Loan Corporation in savings and loan associations. Such agents shall transmit to the Federal Home Loan Bank Administration's district examiner, together with their comments and recommendations thereon, applications for conversion, insurance, and for investments by the Home Owners' Loan Corporation in savings and loan associations, . . . An agent shall forward, when requested by the Governor, advise of action taken by the Federal Home Loan Bank Administration, . . . upon applications, and instructions and other communications from the Federal Home Loan Bank Administration, . . . to the applicant or institution." 8 FR 1431; 24 CFR Cum. Sup. 2.5 (1944 Ed.); 24 CFR 101.10.

(4) *President as agent.* For the following purposes, the President of each Bank shall be the agent of the Federal Home Loan Bank Administration and the Federal Savings and Loan Insurance Corporation.

* * * * *

Said agent shall represent the Federal Home Loan Bank Administration and the Federal Savings and Loan Insurance Corporation in supervising Federal savings and loan associations . . . in the Bank's district. . . . When, in his opinion, such action should be taken, he shall advise and endeavor to assist Federal savings and loan associations . . . to conduct their operations in conformity with the statutes and the rules and regulations governing them. . . . He shall see that all Federal savings and loan associations . . . in his Bank district

submit to him for his consideration such matters as budgets, . . . and such other similar matters as are required to be approved by the Federal Home Loan Bank Administration or by the Federal Savings and Loan Insurance Corporation under the statutes and rules and regulations. When these matters come to the attention of said agent he shall . . . submit them, with his recommendations thereon, to the Governor for such action as he may deem appropriate. After the issuance by the Federal Home Loan Bank administration of a charter for a Federal savings and loan association, said agent shall . . . require the association to comply with the laws, the rules and regulations made thereunder, and such other requirements as may be applicable thereto. . . .” 8 Federal Register 1431, Feb. 3, 1943, 24 CFR Cum. Supp. 2.5; 24 CFR 101.11.

Other regulations pertinent to this case are:

“Forms and reports. Every Federal association shall use such forms . . . as may, from time to time, be prescribed by the Board. . . . The officers of each association shall make a monthly report to the association’s board of directors on forms prescribed by the Board which shall be filed as follows: One copy shall be forwarded to the Federal Home Loan Bank of which the association is a member and two copies to the Governor of the Federal Home Loan Bank System, Washington, D. C.” 24 CFR 143.5.

“PART 6—FEDERAL HOME LOAN BANK BOARD.

(a) *Governor, Federal Home Loan Bank System.* The Governor of the Federal Home Loan Bank System shall be the chief administrative officer under the Federal Home

Loan Bank Commissioner and shall be directly responsible to the Federal Home Loan Bank Administration. . . . The Governor shall be responsible for such supervision of all Federal savings and loan associations as is provided by the statute and regulations made thereunder. . . . Such supervision shall be accomplished through such staff as may be necessary in Washington, D. C., and in the field through the agents of the Federal Home Loan Bank Administration and the Federal Savings and Loan Insurance Corporation.” 8 F. R. 1431, Feb. 3, 1943; 24 CFR Cum. Supp. 6.2.

“PART 7—*Supervision.*

“. . . The Federal Home Loan Bank Administration and the Federal Savings and Loan Insurance Corporation shall have original authority in the exercise of the supervisory powers granted to them by law. . . . supervision of all Federal savings and loan associations, . . . shall be under the direction of the Governor and shall be administered by him through such staff of employees as may be necessary and through the agents of the Federal Home Loan Bank Administration and the Federal Savings and Loan Insurance Corporation.” 8 F. R. 1431, Feb. 3, 1943; 24 CFR Cum. Supp. 7.1.

[The regulation was later modified to provide for a Chief Supervisor, Federal Home Loan Bank System.]

“(e) *Chief Supervisor.* The Chief Supervisor shall be responsible, under the direction of the Governor for such purpose, for the appropriate supervision of all member institutions. The Chief Supervisor shall also perform such other duties as may be assigned to him by the Governor.” 8 Federal Register 9865, July 17, 1943, 24 CFR 1943 Supp. 6.2.

